Supreme Court of the United States

LEO M. FRANK,

Plaintiff-in-Error,

against

STATE OF GEORGIA.

ON MOTION FOR LEAVE TO FILE APPLICATION FOR WRIT OF ERROR.

BRIEF FOR MOTION.

LOUIS MARSHALL,
HENRY C. PEEPLES,
HENRY A. ALEXANDER,
Counsel for Petitioner.

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BEFORE THE

Supreme Court of the United States.

LEO M. FRANK,
Plaintiff in Error,

vs.

STATE OF GEORGIA.

Motion for Leave to file Application for Writ of Error.

Brief for Plaintiff in Error.

Frank was tried in the Superior Court of Fulton County, Georgia, on an indictment for murder, before Judge Roan and a jury. A verdict of guilty was rendered by the jury on August 25, 1913, in the absence of the accused. A motion was thereafter made for a new trial before the trial judge. He denied the motion, saying that

"the jury had found the defendant guilty; that he had thought about the case more than any other that he had ever tried; that he was not certain of the defendant's guilt; that, with all the thought he had put on the case, he was not thoroughly convinced that Frank was guilty or innocent, but that he did not have to be convinced; that there was no room to doubt that the jury was; that he felt it his duty to order that the motion for a new trial be overruled."

The case was then taken by writ of error to the Supreme Court of Georgia, where the judgment was affirmed.

Thereupon a motion was made on behalf of Frank to set aside the verdict that had been rendered in his absence, on the ground that the reception of the verdict in his absence tended to deprive him of his life and liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States, and that he had not been accorded a fair and impartial trial, and was thus denied due process of law.

The Facts Showing Want of Due Process.

The facts stated in the motion, which must be regarded as admitted, are as follows:

At the time when the verdict was received and the jury was discharged, Frank was in custody of the law and incarcerated in the common jail of Fulton County. He was not present when the verdict was received and the jury discharged. He did not waive the right to be present, nor did he authorize any one to waive it for him, nor consent that he should not be present. He did not even know that the verdict had been rendered and the jury discharged until after sentence of death had been pronounced upon him.

His absence was due to the following fact: Shortly before Hon. L. S. Roan, the Judge who presided upon the trial, began his charge to the jury, he privately conversed with L. Z. Rosser and Reuben R. Arnold, two of Frank's counsel, in the jury room of the court house, and referred

to the probable danger of violence that Frank would incur if he were present when the verdict was rendered and the verdict should be one of acquittal. After he had thus expressed himself, he requested counsel to agree that Frank need not be present at the time when the verdict was rendered and the jury polled. Under these circumstances the counsel agreed with the Judge that Frank should not be present at the rendition of the verdict. In the same conversation the Judge expressed his opinion to counsel, that even they might be in danger of violence should they be present at the reception of the verdict. For that reason they agreed with the Judge that they would not be present at the rendition of the verdict.

Frank knew nothing of this conversation, or of any agreement made, until after sentence of death had been pronounced. Pursuant to this conversation none of the counsel for Frank were present when the verdict was received and the jury discharged. Frank did not give to his counsel, nor to any one else, authority to waive his right to be present at the reception of the verdict, or to agree that he should not be present at that time; nor did he authorize counsel to be absent at the reception of the verdict, or agree that they or any of them might be absent.

His counsel were induced to make this agreement because of the statement made to them by the Presiding Judge, and their belief that, if Frank were present and the verdict should be one of acquittal, it might subject him to serious bodily harm, and even to the loss of his life.

As further indicating the conditions under which the trial took place, attention is called to the following additional facts appearing in the motion:

"The court room wherein this trial was held had a number of windows on the Pryor Street side, looking out on a public street of Atlanta and furnishing access to any noises that might occur upon the street. There is an open alleyway running from Pryor Street on the side of the Court House, and there are windows looking out from the courtroom into this alley. Crowds collected therein, and any noises in this alley could be heard in the courtroom. These crowds were boisterous. On the last day of the trial, after the case had been submitted to the jury, a loud and boisterous crowd of several hundred people were standing on the street in front of the Court House, and as the Solicitor General came out greeted him with loud and boisterous applause, taking him upon their shoulders and carrying him across the street into a building wherein his office was located. This crowd did not wholly disperse during the interval between the giving of the case to the jury and the time when the jury reached its verdict, but during the whole of that time a large crowd was gathered at the junction of Pryor and Hunter Streets. Several times during the trial, the crowd in the courtroom and outside of the courtroom, in a manner audible both to the court and jury, would applaud when the State scored a point; a large crowd of people standing on the outside cheering, shouting, and hurrahing, and the crowd within the courtroom signifying their feelings by applause and other demonstrations. On the trial, and in the presence of the jury, the trial Judge in open court conferred with the Chief of Police of Atlanta and the Colonel of the Fifth Georgia Regiment, stationed in Atlanta, which had the natural effect of intimidating the jury and so to influence them as to make impossible a fair and impartial consideration of the defendant's case."

"Indeed, such demonstration finally actuated the court in making the request of defendant's counsel, Messrs. Rosser and Arnold, to have defendant and the counsel themselves to be absent at the time the verdict was received in open court, because the Judge apprehended violence to defendant and his counsel; and the apprehension of such violence naturally saturated the minds of the jury so as to deprive this defendant of a fair and impartial consideration of his case, to which the Constitution of the United States in the Fourteenth Amendment entitled him."

"On Saturday, Aug. 23, 1913, previous to the rendition of the verdict on August 25, the entire public press of

Atlanta appealed to the trial court to adjourn court from Saturday to Monday, owing to the great public excitement, and the court adjourned from Saturday, 12 o'clock noon, to Monday morning, because he felt it unwise to continue the case that day, owing to the great public excitement. On Monday morning the public excitement had not subsided, and was as intense as it was on Saturday; and when it was announced that the jury had reached a verdict the trial Judge went to the courtroom and found it crowded with spectators, and, fearing violence in the courtroom, the trial Judge cleared it of spectators, and the jury was brought in for the purpose of delivering its verdict."

"When the verdict of guilty was announced a signal was given to the crowd on the outside to that effect. The large crowd of people standing on the outside cheered and shouted as the jury was beginning to be polled, and before more than one juror had been polled the noise was so loud and confusion so great that the further polling of the jury had to be stopped so as to restore order; and so great was the noise and cheering and confusion from without that it was difficult for the court to hear the responses of the jurors as they were being polled, though the court was only ten feet distant from the jury. All of this occurred during the involuntary absence of this defendant, he being at the time in the custody of the law and incarcerated in Fulton County Jail, his absence from the courtroom in having been requested by the court on account of fear of violence to him as hereinbefore recited."

The defendant in error demurred to the motion, and on argument before Judge Hill in the Superior Court of Fulton County, the demurrer was sustained, and a judgment was entered dismissing the motion. All of the allegations of fact set forth in the motion were thus admitted.

Frank then sued out a writ of error to the Supreme Court of Georgia and after a hearing in that Court, where the Federal question involved was fully discussed and considered, a judgment was rendered on November 14, 1914, affirming the judgment appealed from. An ap-

plication for a writ of error to this Court, was made to the Acting Chief Justice of the Supreme Court of Georgia, the Chief Justice being ill, and was denied. An application for such a writ was then made to Mr. Justice Lamar, and to Mr. Justice Holmes, who likewise denied it, on the ground that the Supreme Court of Georgia in part based its affirmance on a procedural question. By permission, that application is now renewed before this Court. The petitioner presents thirty-one assignments of error, by means of which it is desired to present to this Court the underlying Federal questions presented by the record.

POINTS.

I.

The reception in Frank's absence of the verdict convicting him of the crime of murder tended to deprive him of his life and liberty without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

That Amendment, so far as applicable here, reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, * * *."

It is a part of the common law developed in English judicial history, as a result of the struggle for liberty that it is essential to a valid trial and conviction on a charge of felony, especially in the case of a capital crime, that the defendant shall be personally present at every stage of the trial, including the reception of the verdict. This principle has been generally recognized as indispensable for the protection of life and liberty of the citizen, to the extent that a deprivation of this right has been regarded by the authorities as constituting a deprivation of one charged with the crime, of due process of law.

The decisions in Georgia bearing upon this subject, are clear and outspoken, and, with one accord, they recognize the applicability of this principle to circumstances precisely like those detailed in the present record.

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.* 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."

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, 116 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 appeal 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. In other words, if he

is not present during every stage of the trial, and especially at its culmination, the reception of the verdict, there has been no trial, whatever jurisdiction the Court previously had is lost, and therefore, the judgment of conviction is without due process of law in the constitutional sense of the term.

This is clearly recognized by the decisions of this Court, arising 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 as well of the court as of the accused; and that such 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.

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 up-

on 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 issued in the United States Circuit Court to procure the discharge of the prisoner because of his 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."

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 of a defendant on trial for felony, who is not at large on bail, at every stage of the trial, 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 the opinion 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.

The same principle has been adopted by the highest courts of other States.

Thus, 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."

Among other authorities which sustain this proposition are the following:

McQuillan vs. *State, 8 Smedes & M. 587.*
Dougherty vs. *Com., 69 Pa. 286.*
Brown vs. *State, 24 Ark. 620.*
Osborn vs. *State, 24 Ark. 629.*
Holton vs. *State, 2 Fla. 500.*
Gladden vs. *State, 12 Fla. 562.*
Rutherford vs. *Com., 78 Ky. 639.*

This right extends to all steps taken in the cause, from the finding of the indictment up to and including the rendering of the verdict.

1 Bish. Cr. Proc. § *682.*
Wheeler vs. *State, 14 Ind. 573.*
Jones vs. *State, 26 Ohio St. 208.*
Clark vs. *State, 4 Humph. (Tenn.), 254.*
Hooker vs. *Com., 13 Gratt. (Va.), 763.*
State vs. *Craton, 6 Ired. Law (N. C.), 164.*
Prine vs. *Com., 18 Pa. St. 103.*
Fight vs. *State, 7 Ohio, 180.*
Jackson vs. *Com., 19 Gratt. (Va.), 656.*
Long vs. *State, 52 Miss. 23.*
Cook v. *State, 60 Ala. 40.*
Wells v. *State, 147 Ala. 140.*
People v. *Bouchamp, 49 Cal. 41.*
People v. *Higgins, 59 Cal. 358.*
Smith v. *People, 8 Col. 457.*
Temple v. *Com., 14 Bush., Ky. 769.*
State v. *Ford, 30 La. Ann. 311.*
State v. *Thomas, 128 La. Ann. 813.*
State v. *Davis, 66 Mo. 684.*
State v. *Jenkins, 84 N. C. 812.*

II.

The right of Frank, who was incarcerated pending his trial, to be present at every stage of it, including the reception of the verdict, is a fundamental right, essential to due process of law.

However much the courts have refrained from attempting a definition of due process, it has

been settled as a finality that in so far as it relates to legal procedure which may affect life, liberty or property, it depends on two component elements: 1. notice of the proceedings, and 2, the right to a hearing, or an opportunity to be heard by the person proceeded against. This right to be heard, or this opportunity to be heard, is not limited to any particular phase of the proceeding. It is co-extensive with the entire proceeding, from its beginning to its termination. Thus, a party would be deprived of due process, were he merely permitted to interpose an answer and subsequently prohibited from participating in the trial of the issues, or of being present at the time of the rendition of the judgment. As was said by Webster in the Dartmouth College Case, when speaking of the law of the land, it "proceeds upon inquiry and renders judgment only after trial". If, therefore, a person brought into court, especially in a criminal proceeding, is not permitted to be present at the rendition of the verdict, which is in reality the culmination of the entire proceedings and without which a trial is unthinkable, he has not had that hearing or opportunity to be heard which is a pre-requisite to due process of law. The fact that he is in the custody of the court, and his presence or absence is subject to the action and control of the court, renders his absence the necessary result of judicial action or non-action, by which he is deprived of that opportunity to be heard, which is his of right.

The principle which we invoke is elaborately and lucidly considered in *Hovey* vs. *Elliott, 167 U. S. 409,* where the court of original jurisdic-

tion struck defendant's answer from its files, as a punishment for his contempt in refusing to obey an order of court. In consequence of this, a decree *pro confesso* was entered against the defendant. This was held to invalidate the decree because of the want of due process of law.

McVeigh vs. *United States, 11 Wall. 259,* and *Windsor* vs. *McVeigh, 93 U. S. 274,* were followed, and this language of Mr. Justice Field from the latter of these cases was cited approvingly:

> "Whenever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. * * * But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive process had better be omitted altogether. It would be like saying to a party, appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized and you shall not be heard."

If in *Hovey* vs. *Elliott* (*supra*) the court had not stricken out the answer, had heard the proofs of the complainant as well as of the defendant and had, because of the defendant's contempt of court, refused to hear him on the final argument, or had made a direction precluding him from being heard as to the nature of the decree to be rendered, there can be no doubt but that the judgment

rendered would under any of these circumstances have been regarded as equally without due process of law. It is immaterial at what stage of a litigation the right to be heard, or the opportunity to be heard is withheld. So long as it is actually interfered with by the direct or indirect action of the court, there is a withholding of due process. This being the rule with respect to civil actions, the strict enforcement of it in a criminal proceeding is superlatively important.

In a criminal case, where the prisoner is not required to become a witness, where he is, however, in evidence from the beginning to the end of the trial, where a jury may be influenced, even at the very last moment, by his demeanor and conduct, his equanimity or excitement, the fact of his mere presence constitutes a potent factor in the hearing or opportunity to be heard to which he is entitled under the Constitution. This is admirably illustrated by the opinion of Mr. Justice Bleckley in *Nolan* vs. *State, 55 Ga. 522,* from which we have quoted (*supra, p. 8*), and where a concrete example was given, demonstrating the value of the prisoner's right to be present at the rendition of the verdict.

This thought is also expressed with great felicity by Chief Justice Gibson in *Prine* vs. *Commonwealth, 18 Pa. 103,* in language which was cited with approval by Mr. Justice Shiras in *Lewis* vs. *U. S., 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, for all practical purposes, 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 verdict is actually rendered The prisoner's opportunity to be looked at by the jury, is in such a case for all practical purposes an opportunity to be heard and may prove the equivalent of a most effective hearing. The human element continues to operate. The eyes of the jury are as valuable a means of receiving an impression as their ears. One accused of crime is engaged in testifying to his guilt or innocence to an intelligent observer during every moment of his trial, even though he remains 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. *Com., 6 Pa. St. 384.*
Temple v. *Com., 14 Bush. Ky., 769.*

The importance of observing the demeanor of the accused by the jury, is well illustrated 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.

It is also conceivable, that before the verdict was rendered in this case, Frank might have asked the court for, and have been granted an opportunity of addressing the jury, or of making a forgotten suggestion bearing upon his defense, which might have exerted a controlling influence upon the minds of the jurors, or of some one of them.

Further discussion of this phase of the question seems, however, to be unnecessary, in view of the unanimity with which this Court, the courts of Georgia and those of practically every other jurisdiction have united in recognizing the right of a prisoner incarcerated during the trial, to be present at the rendition of the verdict. No court has ever considered this to be necessary for idle ceremonial purposes.

It is to be remembered that Frank was not at large on bail. He could not come and go as he pleased. Nor were the circumstances such as existed in *Diaz* vs. *U. S.* (*supra*), or in *Barton* vs. *Staté,* (*supra*), but, as already shown, Frank 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 courtroom except on the initiative and at the instance of the court. Without the exercise of its volition his entire trial might have proceeded *in absentia.* His absence was therefore, the direct result of judicial action. In fact it was because of the positive

request of Judge Roan that Frank's counsel without authority, waived his presence at the reception of the verdict. Had they upon like request waived his presence during the entire trial the situation would have been precisely the same.

It should also be borne in mind that in this case the absence of Frank at the time of the rendition of the verdict was symptomatic of 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, an outburst of which was seriously feared. A trial under such auspices lacked another of the fundamental essentials of due process,—a tribunal in which justice is administered in a secure and orderly manner free from external coercive influences which tend to render the hearing accorded, a mere travesty upon justice, which shocks one's sense of right. A trial with such concomitants is at war with the concept of due process of law and of the theory that life and liberty can only be taken pursuant to the law of the land.

If a criminal trial is so conducted that the court and jury are intimidated by manifestations of extreme hostility to the prisoner on the part of the bystanders, by the extraordinary presence in the court-room in conference with the Judge, of the Chief of Police of the city in which the trial is in progress and of a Colonel of the State militia, when the air is filled with violent outcries and the prosecuting officer is on every appearance greeted with applause in the hearing of the court and jury, and these physical manifestations are followed by the admonition of the Court to the prisoner's counsel that neither he nor

they should be in court at the time of the rendition of the verdict, lest their very lives be forfeited at the hands of an excited mob, how can it be said that he enjoyed that due process of law which the Constitution of the United States guaranteed to him? He certainly is not "proceeded against under *the orderly processes* of law," to which Mr. Justice Day referred in *Ong Chang Wing* vs. *United States, 218 U. S. 280.*

A fair trial is in all of the decisions declared to be 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 the Court, and their influence on the jury, in a criminal case, 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 trial, but a mere mockery, and that the request by a trial judge, under circumstances like those in the present case, of a waiver by the prisoner of his presence at the trial, renders the proceedings null and void:

> *Massey* v. *State, 31 Tex. Cr. Rep. 371; 20 S. W. Rep. 758.*
> *State* v. *Welden, 91 S. C. 29; 39 L. R. A., N. S. 667.*
> *Sanders* v. *State, 85 Ind. 318.*
> *State* v. *Davis, 66 Mo. 684.*

III.

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

It is admitted by the demurrer as a fact 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 admitted 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 rendered 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 is unwarranted.

The question therefore arises, whether the attempted waiver of his presence by Frank's 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 there is no pretense that he personally waived the right to be present, or authorized 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.

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 Georgia, and the opinion of the court delivered in that case by Judge Bleckley. And the absolute necessity of the distinction, or 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 proceeding 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 quoted under Point I, 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 also that the weight of authority is 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."

This question has been most effectively considered by this Court in the cases cited under Point I.

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.' *Prine* 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 on 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, instead 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 is the leading case of *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 in this action:

"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 constituton and the laws. Effect may justly and safely be given to such consent in many particulars; and the law does, in respect to various 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 in the mode 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 con-

clusion 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 number short of a full panel of twelve jurors, and we think it ought not to be tolerated."

IV.

It would seem to follow logically from the propositions thus far discussed that if neither Frank nor his counsel could expressly waive his right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any pretended ratification by him or acquiescence on his part in any action taken by his counsel.

In all of the cases cited under Point III (and many more might be added from various jurisdictions), the Courts proceeded on the theory that the right of the prisoner to be present at every stage of the trial, including the rendition of the verdict, was of such a nature as not only to con-

cern him, but the public and the cause of justice as well, and that, however specific may be the terms of a waiver by one charged with a capital offense, who, at the time of his trial is incarcerated, such consent would be an absolute nullity. In some cases, particularly *Thompson* vs. *Utah, 170 U. S. 343,* it was said that it was not within the power of one so accused to consent to the withholding of his constitutional right either expressly or by his *silence.*

Ratification at most is merely the equivalent of prior authority. Authority from a principal to an agent cannot be more effective under the law than the act of the principal himself. Consequently, by ratifying the unauthorized act of an agent, the principal is merely doing an act which he might have performed in the first instance. If, therefore, he could not in the first instance have waived a right, a thousand attempted ratifications by him of an unauthorized waiver by his agent cannot give validity to the waiver, or impart legality to a nullity.

So, too, acquiescence can only operate in the sense of a prior consent of authority. It is not in legal intendment more potent than was the silence considered in *Thompson* vs. *Utah, supra.* If, therefore, Frank had a constitutional right to be present at the time of the rendition of the verdict in his case, which he could not waive, that right is not affected either by the authorized or unauthorized consent of his attorneys to the reception of the verdict in his absence, or by his ratification of their attempted waiver, or by his apparent acquiescence therein. His constitutional right, protective of his life and liberty, unless taken from him by due process of law, survives any express

or implied consent or waiver by him, in whatsoever form, or by whatever method such waiver is sought to be spelled out.

It should not be overlooked that although the Supreme Court of Georgia in its opinion in this case refers to the absence of Frank, when the verdict was received, as "a mere incident of the trial," according to the authorities which we have cited, this is a grave misconception. His absence did not constitute an irregularity. It created a nullity. It affected the jurisdiction of the Court. It amounted to a fundamental vice in the proceedings. It was no more "a mere incident" of the trial than the right to be heard is a mere incident in any cause, civil or criminal. Upon his presence depended the right of the court to render a judgment which involved the taking of his life, or liberty property. When the verdict was received in his absence the jurisdiction of the Court over him, previously existing and to pronounce judgment against him was lost. Thenceforth the case was *coram non judice*. Consequently, although an irregularity might have been waived by Frank, or the waiver of an irregularity by his authorized attorneys might have been ratified or acquiesced in, by him, he could not ratify or acquiesce in an act absolutely null and void to which he himself could not have given vitality.

V.

If, therefore, Frank's absence at the reception of the verdict constituted an infraction of due process of law, which could not be waived, directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, the fact that he did not raise the jurisdictional question on his motion for a new trial, did not deprive him of his constitutional right to attack the judgment based on the illegal verdict, as a nullity.

The converse of the proposition is that Frank is estopped from questioning the legality of the judgment. In other words, it must be claimed that though jurisdiction may not be conferred by consent, it may be, by means of an estoppel. This we deny.

Moreover, there is no basis for predicating the claim of estoppel on the fact that the jurisdictional question was not raised on the motion for a new trial. The State has not been injured thereby. It has not changed its position because of the procedure adopted. The verdict had been received, the jury discharged and Frank sentenced, before he knew of the facts which nullified the verdict. The State could not thereafter, by anything that it could do, alter the situation or impart validity to a proceeding which had become a nullity. The verdict was void and avoided the trial, not because of anything that Frank did, but because of

the act of the State in disregarding his constitutional right.

When, therefore, in its opinion, the Supreme Court of Georgia, seeks to sustain the validity of a nullity, by regarding it as a mere irregularity or error, and treats the procedure adopted on Frank's behalf as an acquiescence in such irregularity, and as operating by way of an estoppel against him, it is merely an attempt on its part to interpret the Fourteenth Amendment, by virtually deciding that Frank's absence at the time of the rendition of the verdict, was not an invasion of the due process clause; that in any event his absence could be waived, and that it was in fact waived by the failure of his attorneys to urge the nullity of the judgment when they moved for a new trial. That would prove to be a new method of overcoming an inherent jurisdictional defect in a judgment.

If this is not the legal effect of its decision, then it may be said with entire confidence that the opinion of the Supreme Court amounts to an evasion of the Federal question which underlies the entire case.

VI.

Assuming, but not conceding, that a motion for a new trial by Frank was, as is asserted by the Supreme Court of Georgia in this case, an available remedy to test the legality of the verdict, received in his absence, it did not decide that a motion to set aside the verdict was not a proper remedy to declare its nullity. Hence, in so far as its conclusion that the motion to set aside the verdict was too late, was based on Frank's failure to question its legality on the earlier motion, the Court in effect decided that the constitutional objection was waived.

It is not pretended that any question as to the nullity of the verdict was presented or determined on the motion for a new trial. There is nothing in the motion, to which a demurrer has been interposed, which suggests such an idea. The Court, however, in passing on the soundness of the demurrer, took judicial notice of the record before it on the review of the motion for a new trial, and referred to a recital of fact contained in the 75th ground of motion for a new trial. That ground has been certified here, by the Clerk of the Supreme Court of Georgia. It merely relates to the proposition that the trial was not a fair and impartial one. It recounts various episodes attending the trial and incidentally states that the

prisoner was not present at the rendition of the verdict, his counsel having waived his presence. It requires no argument to indicate that this was not the presentation of the constitutional question now under consideration, and that the Court did not, and could not have passed upon it on the motion for a new trial.

It is, therefore, useful to consider the respective purposes of the motion for a new trial and of the motion to set aside the verdict. The former proceeded solely on the theory that because of errors occurring during the progress of the trial Frank was entitled to a retrial before another jury. That idea is inseparable from the inherent nature of the motion. It is for *a new trial.* Consequently when he made that motion Frank proceeded on a theory independent of and distinct from that underlying a motion to set aside the verdict. The latter is founded on the theory that the trial which resulted in the verdict of guilty became a nullity in consequence of Frank's deprivation of due process of law, and the consequent loss by the Court of jurisdiction to render judgment. The determination of that proposition was not included, in the application for a new trial, which was, both practically and theoretically, inconsistent with the idea of nullity and loss of jurisdiction.

We confidently believe that nothing will be found in the opinion of the Supreme Court of Georgia in this case, which declares that a motion to set aside a verdict in a case like the present is not a proper remedy. That it is, was squarely decided in *Nolan* vs. *State, 53 Ga. 136; Nolan* vs. *State, 55 Ga. 521; Barton* vs. *State, 67 Ga. 653; Lyons* vs. *State, 7 Ga. App. 50.* The Su-

preme Court of Georgia, in its opinion rendered in the present case, treated *Nolan* vs. *State* as reported in *53 Ga. 136,* and *55 Ga. 521,* as two separate and independent cases. In fact, both decisions are in the same case. Nolan, after his first conviction, moved in arrest of judgment, stating as a ground for reversal that the verdict was received in his absence. The Court decided such a motion not to be the proper remedy, but that a motion to set aside the verdict was. A motion to set aside the verdict was then made after affirmance on the first appeal, the motion was granted, and the court, on the appeal from the second trial which followed, gave effect to the judgment setting aside the verdict.

The Supreme Court of Georgia not having, therefore, declared that the remedy by motion to set aside the verdict could not be resorted to, merely decided that, inasmuch as a motion for a new trial might have been available for raising the constitutional question, Frank's failure to make such motion after he became aware of the facts upon which such motion might have been predicated, was precluded by waiver, estoppel, acquiescence or some other equivalent of consent, from moving subsequent to the denial of the motion for a new trial, for the purpose of procuring a declaration of nullity of the judgment because it was unsupported by due process of law. This, we respectfully submit, is but another way of saying, that Frank's constitutional right could be and had been impliedly waived by him. For reasons heretofore urged, this decision necessarily involved a Federal question, to wit, the interpretation of the due process clause of the Fourteenth Amendment and an adjudication as to the effect of its disregard.

We venture here to advert to the memorandum of Mr. Justice Lamar, on denying the application for a writ of error presented to him. While it is recognized, as a general proposition, that a matter of State practice presents no Federal question, and that it is for the States to regulate their procedure, it is our contention that the Supreme Court of Georgia, in effect, decided that, because the constitutional question was not raised on the motion for a new trial, the prisoner thereby waived his constitutional objection to the jurisdiction of the court to render judgment against him. In that aspect the decision is not one involving a mere matter of State practice, but deals with the fundamental constitutional question, and its corollary—the right of the prisoner to waive the want of due process by reason of which the judgment of conviction became a nullity.

Referring to the memorandum of Mr. Justice Holmes, in which stress is laid on the opinion of the Supreme Court of Georgia that the case was finished when the previous motion for a new trial was denied, it is our contention that the case obviously cannot be finished until the judgment rendered has been executed, and that it must lie within the inherent power of any court, to treat as void that which, in the eye of the law, is a nullity, in consequence of the absence of or loss of jurisdiction by the court which rendered the judgment.

When thoroughly analyzed, the denial of relief by the Supreme Court of Georgia was based on the theory of waiver, or its equivalent, by the accused of his constitutional right. This is a position which, under previous Points, we have sought to show, is untenable.

VII.

But even if the decision of the Supreme Court of Georgia were to be interpreted as deciding that a motion for a new trial is the only method by which the constitutional question with which we are now concerned can be raised, then, we contend, that such a decision as applicable to the present case would be in conflict with the Constitution of the United States, because it would be an ex post facto law.

It may well be claimed in view of the history of Georgia procedure, that this decision is the equivalent of a new law, for the first time adopted, regulating the remedy in a case of constitutional infraction resulting in the nullity of a verdict. Were the decision regarded as holding that a motion for a new trial is the only remedy by which to seek relief in such a case (which, we have just argued, it has not held), it would be the first announcement of such a rule by that Court. The most that can be said is that heretofore similar questions have been raised on motions for a new trial, without objection. But hitherto every adjudged case has been to the effect that a motion to set aside the verdict is a proper remedy, and in *Nolan* vs. *State, supra,* and *Lyons* vs. *State, supra,* it was decided that it was *the* proper remedy. Frank relied upon this unbroken line of precedents, the soundness of which had never been questioned, and had always been recognized. *Rawlins* vs.

Mitchell, 127 Ga. 24. If, therefore, the Supreme Court of Georgia, by a sudden departure from its previous decisions, relied upon by him, could deprive him of his right to raise the constitutional question which we have so exhaustively discussed, that decision would in itself not only amount to an infraction of the due process clause of the Constitution, but it would also violate Article I, Section 10 of the Constitution, which prohibits the passing of an *ex post facto* law.

In *Hopt* vs. *Utah, supra,* Mr. Justice Harlan expressly decided that a statute that takes from the accused a substantial right given to him by a law in force at the time to which his guilt relates, would be *ex post facto* in its effect and operation, and that legislation of that kind cannot be sustained, simply because in a general sense it may be said to regulate procedure. "The difficulty is not so much," says Mr. Justice Harlan, "as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes in their operation take from the accused any right that was regarded at the time of the adoption of the statute as vital for the protection of life and liberty and which he enjoyed at the time of the commission of the offense charged against him".

If a court could turn its face upon its previous precedents in a matter so vital as that which we are now considering, then one accused of crime who, as Frank did in the present case, relies upon such precedents, would be caught like a rat in a trap.

Under the law of Georgia, a unanimous decision of it Supreme Court has the force of a

statute until it has been reversed by a full bench after argument on a request for review granted by the Court.

Laws of Georgia, Acts of 1858, p. 74.
Code of Georgia, 1911, § 6207.
28 Ga. 597.
30 Ga. 202.
59 Ga. 54.

The precedents from the Supreme Court of Georgia to which we have referred were unanimous decisions of that court.

In this respect the case comes within the principle laid down in *Muhlker* vs. *N. Y. & H. R. Co., 197 U. S. 544,* where this Court assumed jurisdiction to reverse a judgment of the Supreme Court of New York, *in error to that court,* because the latter had departed from a line of decisions which were regarded as constituting a rule of property. Although that case involved the "impairment of contract clause", it is believed that the application of the same principle to a case arising under "the due process clause" is founded on equally sound principles of constitutional law.

But irrespective of the considerations which we have thus far discussed under this point, we again urge that in effect the decision actually rendered proceeded on the theory that the course of procedure adopted by Frank, because of his non-action, his failure to raise the constitutional and jurisdictional question at the first opportunity, operated as a waiver of his constitutional right. This view we have sought to show is opposed to the decision of this Court.

VIII.

Considering the record in all of its features, there is to be perceived in it a broad, underlying Federal question which, from whatever angle the case may be approached, permeates it and controls all other questions considered in the opinion of the Supreme Court of Georgia.

In *Chicago, Burlington & Quincy R. Co.* vs. *Drainage Commissioners, 200 U. S. 561,* it was held that the failure of the State court to pass on the Federal right or immunity specially set up of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. Mr. Justice Harlan said:

"The contention is that as the State court based its judgment on the common law duty of the railway company, and not expressly on any Federal ground, it cannot be said that there was any denial of the Federal right claimed by the company; consequently, it is argued, this court is without jurisdiction to re-examine the final judgment.

Undoubtedly, the general rule is that where the judgment of the State court rests upon an independent, separate ground or local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may

be appropriate, without considering that question. But it is equally well settled that the failure of the State court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this Court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. And such plainly was the effect of the judgment in this case. If, as the railway company contended, the proposed action of the Drainage Commissioners would deprive it of property without due process of law and also debar to it the equal protection of the laws, then a judgment should have been rendered for the company. And that result could not be avoided merely by silence on the Federal question and by placing the judgment on some principle of the common law. The constitutional grounds relied on must, if sustained, displace or supersede any principle of general or local law which, but for such grounds, might be sufficient for the complete determination of the rights of the parties. The claim of a Federal right or immunity specially set up from the outset went to the very root of the case and dominated every part of it. If that claim be valid, then the law is for the railway company, for the supreme law of the land must always control. Therefore, a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied. That claim having, then, been distinctly set up by the company, and being broad enough to cover the entire case, it may not be ignored, and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States. If the case had been decided in favor of the railway company on some ground of local or general law, then the claim of a Federal right would have become immaterial, and we could not have re-examined the judgment. But the decision was otherwise and was, in law, a denilla of the claim of a Federal right."

In *West Chicago Street R. R. Co.* vs. *Illinois, 201 U. S. 506,* it was held that although the judgment of the State court rests partly on grounds

of local or general law, and although the opinion may not expressly refer to the Constitution of the United States, if by its necessary operation the judgment rejects a claim, based on a constitutional right specially set up in the answer, that the relief prayed cannot, in any view of the case, be granted consistently with the contract or due process clauses of the Constitution, this court has jurisdiction to review under Section 709 of the Revised Statutes.

So it has also been held that it is the power and duty of this court to determine for itself the existence or non-existence of a contract, the obligation whereof is claimed to have been impaired, and a Federal question may be involved, although the State court may have rested its decision on the construction of the Constitution and laws of the State.

Michigan vs. *Lawrey, 199 U. S. 233.*

So, where the State court has sustained a result which cannot be reached except on what this court deems a wrong construction of the charter, without relying on unconstitutional legislation, this court cannot decline jurisdiction on writ of error because the State court apparently relied more on the untenable construction than on the unconstitutional statute.

Terre Haute & Ind. R. R. Co. vs. *Indiana, 194 U. S. 579.*

In *American Express Co.* vs. *Iowa, 196 U. S. 133*, Mr. Justice White said:

"In accord with the opinion of the Supreme Court of Iowa it is insisted at bar that this writ of error

should be dismissed for want of jurisdiction, because the decision below involved no Federal question, and the case of O'Neill *vs.* Vermont, 144 U. S. 324, is relied upon. The contention is untenable. As pointed out in Norfolk & Western Ry. Co. *vs.* Sims, 191 U. S. 441, the view taken of the O'Neil case is a mistaken one. True, in that case the Supreme Court of Vermont gave to a C. O. D. shipment the effect attributed to it by the Supreme Court of Iowa in this case. True, also, a writ of error was prosecuted from this court to the Vermont court upon the assumption that the commerce clause of the Constitution was involved, but this court dismissed the writ of error because it did not appear that the commerce clause of the Constitution was relied on in the State court, was in any way called to the attention of that court, or was passed upon by it. As on this record it appears that the protection of the commerce clause was directly invoked in the State court, it is apparent that the O'Neil case is inapposite. And as, in order to decide the contention that the judgment below rests upon an adequate non-Federal ground, we must necessarily consider how far the C. O. D. shipment was protected by the commmerce clause of the Constitution, which is the question on the merits, we pass from the motion to dismiss to the consideration of the rights asserted under the commerce clause of the Constitution."

See also—

Murdock vs. *Memphis, 20 Wall. 590, 636.*
Anderson vs. *Carkins, 135 U. S. 483.*
Wabash R. R. Co. vs. *Pearce, 192 U. S. 179.*
Terre Haute vs. *Indiana, 194 U. S. 579.*
Schlemmer vs. *Buffalo, Rochester, &c. R. Co. 205 U. S. 1.*

In the last of these cases it was held that where a Federal question is duly raised at the proper time and in a proper manner in the State court and the judgment of the State court necessarily involves the decision of such question, this Court on writ of error will review the judgment although the State court in its opinion made no reference to

the question; and if it is evident that the ruling of the State court purporting to deal only with the local law has for its premise or necessary concommitant a cognizable mistake, that may be sufficient to warrant a review. Mr. Justice Holmes said:

"We certainly do not mean to qualify or limit the rule that, for this court to entertain jurisdiction of a writ of error to a State court it must appear affirmatively that the State court could not have reached its judgment without tacitly, if not expressly, deciding the Federal matter. But on the other hand, if the question is duly raised and the judgment necessarily, or by what appears in fact, involves such a decision, then this court will take jurisdiction, although the opinion below says nothing about it. *Kaukauna Water Power Co.* vs. *Green Bay & Miss. Canal Co., 142 U. S. 254.* And if it is evident that a ruling purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review. *Terre Haute & Indianapolis R. R. Co.* vs. *Indiana,* 194 U. S. 579. The application of this rather vague principle will appear as we proceed."

IX.

Other authorities bearing on the question of jurisdiction:

"Where on error to a Supreme Court of a State the record shows a decision of the State Court on a federal question properly presented and of which the Supreme Court could take jurisdiction, and also the decision of a local question, the writ of error will not be dismissed on motion in advance of the hearing. The parties are entitled to be heard on the soundness of the decision below on the Federal question, on the sufficiency of that question to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the

judgment even if the Federal question was erroneously decided."

Maryland &c. R. Co. vs. *Maryland, 20 Wall. 643.*

"We can only look beyond the Federal question when that has been decided erroneously, and then only to see whether there are any other matters or issues adjudged by the State court sufficiently broad to maintain the judgment notwithstanding the error in the decision of the Federal question."

McLaughlin vs. *Fowler, 164 U. S. 663.*

"Where the Supreme Court of a State based its judgment solely on a ground involving a determination of a Federal question its decision is subject to review in the Supreme Court of the United States, although the judgment of the State court might have been based upon some ground of local or general law broad enough in itself to sustain the decision without determining the federal question."

Henderson Bridge Co. vs. *Henderson, 173 U. S. 592.*

In *Carter* vs. *Texas, 177 U. S. 442,* it was held that wherever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment to the Constitution of the United States, and when a defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the constitution of the grand jury upon this ground may

be taken, either by plea in abatement, or by motion to quash the indictment, before pleading in bar. The question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a State court, is itself a Federal question, in the decision of which this Court, on writ of error, is not concluded by the view taken in the highest court of the State.

In *L. & N. R. Co.* vs. *Woodford, 234 U. S. 46,* it was inferentially decided, as it has been in other previous cases, that if a State court takes unwarranted resort to rules of practice to avoid the decision of a Federal question, this Court will nevertheless review the judgment. Mr. Justice Day said:

> "In this case there is no reason to believe that there *was an attempt on the part of the State court to avoid the decision of Federal questions, duly set up, by unwarranted resort to alleged rules under local practice,* and upon this point this case comes within former rulings of this Court, as we have seen."

X.

Every doubt should be resolved in favor of the petitioner, in favorem vitae.

Can there be a serious question as to the fundamental merit of our contention that Frank has been deprived of due process of law? If not, this Court should be astute in heeding the call of the

Constitution. To do otherwise, in the present case not only means the death of this unfortunate man, the victim of a horrible mistake, but the undermining of the effectiveness as well, of the Federal Constitution as an instrument for the preservation of life and liberty and the safeguarding of one accused of crime against the consequences of an inflamed public mind.

Nothing can be said which more conclusively justifies this statement, than the extraordinary remarks of Judge Roan on denying the motion for a new trial, which we have quoted at the beginning of this argument. This is the pronouncement of the very judge who during the trial was so alarmed at the demonstrations of hostility and of the clamor of the mob in the very sanctuary of Justice, that he practically compelled the absence of Frank and his counsel at the rendition of the verdict. It was a judicial admission that the administration of justice had broken down; that its proceedings were controlled by a mob; that fear of its action hovered like an evil spell over the court and jury, who composed the tribunal which was to hear and to decide the guilt or innocence of the accused, without the intervention of other factors, (*People* vs. *Bork, 96 N. Y. 199*), whose intervention converted the Court into an unauthorized tribunal. For all practical purposes the mob paralyzed the judicial function, and the duly constituted authority, at the most critical moment of the trial surrendered its judicial powers, and permitted itself to be coerced by the ominous threats of prejudice, and the terrors of violence, into denying one of the substantial and elementary rights of the man whose steadfast insistence on his innocence, had inflamed the hostile passions of lawlessness.

This is, therefore, a case which not only discloses the existence of a grave doubt in the mind of the trial judge, as to the guilt of the prisoner, but also one where the trial proceeded in an atmosphere surcharged with external influences which deprived it of those qualities of fairness and impartiality, which cannot be dissevered from due process of law.

XI.

It is respectfully submitted that there is strong legal ground for the allowance of a writ of error, as prayed for.

Louis Marshall,
Henry C. Peeples,
Henry A. Alexander,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

LEO M. FRANK, PLAINTIFF IN ERROR,

vs.

THE STATE OF GEORGIA, DEFENDANT IN ERROR.

PETITION FOR WRIT OF ERROR.

LOUIS MARSHALL,
H. C. PEEPLES,
JOHN L. TYE,
HENRY A. ALEXANDER,
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HERBERT J. HAAS,
Attorneys for said Leo M. Frank.

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PETITION FOR WRIT OF ERROR.

To the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the Associate Justices of said Court:

Now comes Leo M. Frank, plaintiff in error, and says:

That on the 25th day of August, 1913, he was convicted of murder and afterward was sentenced to death by the Superior Court of Fulton County, Georgia. On April 16, 1914, a motion to set aside the verdict rendered against him was filed in the said Superior Court, and came on to be heard in said Court on June 5, 1914, at which time the defendant in error filed a general demurrer and special demurrers to the said motion, which were on June 6th, 1914, sustained, and the said motion to set aside the verdict was dismissed. Thereafter, and on November 14, 1914, the Supreme Court of the State of Georgia affirmed the aforesaid judgment of

the Superior Court of Fulton County, Georgia, and thereupon the said judgment became final.

Your petitioner was and is aggrieved by the aforesaid judgment and decision, in that in said judgment and the proceedings had prior thereto in this cause certain errors were committed to his prejudice, said Supreme Court of Georgia being the highest court of said State in which a decision in this suit could be had.

In this suit there was drawn in question the validity of an authority exercised under the State of Georgia on the ground of its repugnancy to the Constitution of the United States and a decision rendered in favor of its validity, and rights, privileges and immunities were claimed by your petitioner under the Constitution of the United States, and particularly under the Fourteenth Amendment thereto, and the decision rendered by said court is against the rights, privileges and immunities specially set up and claimed by your petitioner under the Constitution of the United States and particularly the Fourteenth Amendment thereto, all of which will more fully appear in detail from the Assignment of Errors filed herewith.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue to the Supreme Court of Georgia for the correction of the errors complained of, and that duly authenticated transcript of the record, proceedings and papers herein may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper.

LEO M. FRANK,
By LOUIS MARSHALL,
H. C. PEEPLES,
JOHN L. TYE,
HENRY A. ALEXANDER,
LEONARD HAAS,
HERBERT J. HAAS,
Attorneys for said Leo M. Frank.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

LEO. M. FRANK, PLAINTIFF IN ERROR,
vs.
THE STATE OF GEORGIA, DEFENDANT IN ERROR.

Assignments of Error on Writ of Error.

Now comes Leo M. Frank, the plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in the said cause, the Supreme Court of the State of Georgia erred to the grievous injury and wrong of the plaintiff in error in said cause, and to the prejudice and against the rights of the plaintiff in error herein, in the following particulars, to wit:

I.

The said Supreme Court erred in affirming the judgment of the Superior Court of Fulton County, Georgia, which sustained the demurrer interposed by the defendant in error to the motion of the plaintiff in error to set aside the verdict whereby the plaintiff in error was convicted of murder, and the said conviction of murder.

II.

The said Supreme Court erred in affirming the judgment of the Superior Court of Fulton County, Georgia, which denied the motion of the plaintiff in error to set aside the verdict convicting him of murder.

III.

The said Supreme Court erred in overruling the motion of the plaintiff in error to set aside the verdict convicting him

of murder on the ground that the said verdict was received in the involuntary absence of the plaintiff in error while he was confined in jail, thereby tending to deprive him of his life and liberty without due process of law, contrary to and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

IV.

The said Supreme Court erred in overruling the motion of the plaintiff in error to set aside the verdict convicting him of murder on the ground that the reception of the said verdict during the involuntary absence of the plaintiff in error and while he was confined in jail, deprived the proceedings against him of the character of a trial, to which he was entitled under the law, and deprived him of the hearing and opportunity to be heard in his own defense to which he was entitled under the provisions of the Fourteenth Amendment to the Constitution of the United States.

V.

The said Supreme Court erred in overruling the motion of the plaintiff in error to set aside the verdict convicting him of murder on the ground that the reception of the said verdict during the involuntary absence of the plaintiff in error and while he was confined in jail, tended to deprive him of his life and liberty without due process of law, in that said proceedings did not constitute a trial, his presence during every stage of the trial, and especially at its culminating stage, the rendition of the verdict, being an essential prerequisite to a legal trial.

VI.

The said Supreme Court erred in holding that the right of a person, on his trial for murder, to be present at the ren-

dition of the verdict in the cause, is a mere incident of the trial, and his involuntary absence an irregularity only, which holding was error because such right is one of the most substantial rights accorded to a defendant, and the deprivation of such right is a violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, that no State shall deprive any person of life, liberty or property without due process of law, since to accord one the right to be present merely during part of the progress of his trial and deprive him of such right to be present at the rendition of the verdict, does take from him the right to be present and defend his cause.

VII.

The said Supreme Court erred in holding that the plaintiff in error had been afforded due process of law under the Fourteenth Amendment to the Constitution of the United States.

VIII.

The said Supreme Court erred in holding that the plaintiff in error, having been indicted for murder and had a full opportunity under the Constitution and laws of the State of Georgia to defend his case in the courts of the State in person, by attorneys, or both, according to the established constitutional rules of procedure, he has been afforded due process of law under the Fourteenth Amendment to the Constitution of the United States, although the verdict convicting him of murder was received in his absence, without his consent, and while he was incarcerated in jail.

IX.

The said Supreme Court erred in holding that the plaintiff in error had been accorded the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

X.

The said Supreme Court erred in holding that the plaintiff in error had the power to waive his presence at the reception of the verdict convicting him of murder.

XI.

The said Supreme Court erred in holding that the plaintiff in error was precluded from moving to set aside the verdict convicting him of murder by the consent of his counsel that the verdict might be received in his absence and while he was incarcerated in jail.

XII.

The said Supreme Court erred in refusing to hold that the personal presence of the accused at each and every stage of his trial for a capital felony, including the reception of the verdict, is an essential and integral element of due process of law as guaranteed by the First Section of the Fourteenth Amendment to the Constitution of the United States, and not a mere incident of the trial, and which, being a right affecting the public interest, can not be waived or surrendered by the accused, as a mere irregularity, either prospectively or by subsequent acquiescence, and especially not when such waiver was extorted by hostile demonstration against the accused, overthrowing and prostrating the authority of the court, and causing the presiding judge to advise the counsel of the accused to absent themselves at the reception of the verdict and to agree that the accused should be kept incarcerated in jail at said time for fear that if the accused and his counsel were in the court room and he should be acquitted, they would all be in danger of violence or even of loss of life.

XIII.

The said Supreme Court erred in refusing to hold that the alleged waiver of the plaintiff in error's counsel extorted from them by the statement of the presiding judge that if they were present and the verdict should be one of acquittal they and the plaintiff in error would be in danger of violence, was utterly null and void and of no effect whatsoever and was wholly incapable of being ratified or acquiesced in by any subsequent act of plaintiff in error or his counsel, such ruling tending to deprive him of his life and liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

XIV.

The said Supreme Court erred in holding that the plaintiff in error was precluded from moving to set aside the verdict convicting him of murder where his counsel at the suggestion of the trial judge waived his presence at the reception of the verdict without his knowledge or consent, and where the verdict was received and the jury polled by the court when the plaintiff in error was not present but was confined in jail, and his counsel were also absent, and where, when he was sentenced to suffer death, he was present in court in person and by counsel, and later, within the time allowed by law, made a motion for a new trial which recited, among other things, (but which was not made a ground of said motion), his absence at the reception of the verdict and that his presence had been waived by his counsel, and his motion for a new trial was refused by the trial court, and its judgment affirmed by the Supreme Court.

XV.

The said Supreme Court erred in holding that the plaintiff in error will be considered as having acquiesced in the

waiver made by his counsel of his presence at the reception of the verdict convicting him of murder, by the fact that after such verdict had been received and he had been sentenced to suffer death his attorneys, within the time allowed by law, made a motion for a new trial which recited among other things his absence at the reception of the verdict and that his presence had been waived by his counsel (but which was not made a ground of said motion) and his motion for a new trial was refused by the trial court and its judgment affirmed by the Supreme Court.

XVI.

The said Supreme Court erred in holding that the motion of the plaintiff in error to set aside the verdict convicting him of murder be dismissed because of a course of conduct on his part amounting to an estoppel, such ruling tending to deprive him of his life and liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

XVII.

The said Supreme Court erred in holding that the motion of the plaintiff in error to set aside the verdict convicting him of murder should be dismissed because of acquiescence on his part in the action of his counsel in waiving his right to be present at the reception of the verdict, such ruling tending to deprive him of his life and liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

XVIII.

The said Supreme Court erred in refusing to hold that the personal presence of the plaintiff in error from the beginning to the end of his trial on the charge of murder, in-

cluding the time of the rendition of the verdict, was an indispensable element of due process of law within the provisions of the Fourteenth Amendment to the Constitution of the United States.

XIX.

The said Supreme Court erred in refusing to hold that the presence of the plaintiff in error at every stage of the trial, inclusive of the reception of the verdict, was as important as the right of trial itself, and that the plaintiff in error, being in custody charged with a capital offense, was incapable of waiving such right.

XX.

The said Supreme Court erred in refusing to hold that the counsel for the plaintiff in error could not in his absence, nor while he was incarcerated in jail, waive the right of the plaintiff in error to be present at the reception of the verdict rendered against him in this cause.

XXI.

The said Supreme Court erred in holding that the reception of the verdict against the plaintiff in error in his absence and in the absence of his counsel did not deprive him of due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States, and that such right could be waived either by the consent of his counsel or by the procedure subsequently pursued by his counsel in moving for a new trial.

XXII.

The said Supreme Court erred in refusing to hold that it was not within the power of the plaintiff in error or his coun-

sel to dispense with his personal presence at every stage of the trial, including the reception of the verdict, and that the determination of his life or liberty without being so present was without that due process of law required by the Fourteenth Amendment to the Constitution of the United States.

XXIII.

The said Supreme Court erred in holding that by the reception of the verdict against the plaintiff in error in his absence, without his knowledge or consent, he was not deprived of a fundamental right the observance of which is indispensable to the life and liberty of the citizen within the Fourteenth Amendment to the Constitution of the United States.

XXIV.

The said Supreme Court erred in holding that all the requirements of due process of law were fully met by the proceedings had against the plaintiff in error in the trial court, notwithstanding the reception of the verdict convicting him of murder in his absence, without his knowledge or consent, and without any waiver on his part of the right to be present.

XXV.

The said Supreme Court erred in refusing to set aside the verdict convicting the plaintiff in error of murder on the ground that Hon. L. S. Roan, the Judge presiding at the trial, upon considering the motion for a new trial made by the plaintiff in error after the reception of the verdict, rendered his judgment denying the motion, and in rendering said judgment stated that the jury had found the defendant guilty and that he, the said Judge, had thought about the case more than any other he had ever tried, and that he was

not certain of the defendant's guilt; that with all the thought he had put upon the case he was not thoroughly convinced whether the plaintiff in error was innocent or guilty, but that he did not have to be convinced, that the jury was convinced, and that he felt it to be his duty to order the motion for a new trial to be overruled, the plaintiff in error being thereby denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, the court having failed to give to him the judicial determination of the motion, or a fair and lawful trial, to which he was entitled.

XXVI.

The said Supreme Court erred in refusing to set aside the verdict convicting the plaintiff in error of murder on the ground that a fair and impartial trial was not accorded to him because of the conditions attending the trial set forth in the Seventh reason specified in the plaintiff in error's motion to set aside the verdict, such acts constituting a deprivation of life and liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

XXVII.

The said Supreme Court erred in refusing to set aside the verdict convicting the plaintiff in error of murder on the ground that the conditions attending the trial, and which led the court to request the counsel for the plaintiff in error to permit the verdict to be received during the absence of the plaintiff in error and of his counsel, were such as to tend to deprive the plaintiff in error of his life and liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

XXVIII.

The said Supreme Court erred in refusing to set aside the verdict convicting the plaintiff in error of murder because of the conference by the trial judge in open court with the Chief of Police of Atlanta and the Colonel of the Fifth Georgia Regiment stationed in Atlanta, under the circumstances set forth in the Seventh paragraph of the motion to set aside the verdict, and of the involuntary absence of the plaintiff in error from the court at the time of the reception of the verdict in consequence thereof, such acts depriving the plaintiff in error of due process of law and of such a fair and impartial consideration of his case as is guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

XXIX.

That said Supreme Court erred in holding that the plaintiff in error was afforded due process of law and the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States, said error being in holding that plaintiff in error is considered as having acquiesced in the waiver made by his counsel of his presence at the reception of the verdict, by the fact that after such verdict had been received and he had been sentenced to suffer death, his attorneys, within the time allowed by law, made a motion for a new trial which recited, among other things, his absence at the reception of the verdict and that his presence had been waived by his counsel (but which was not made a ground of said motion) and his motion for a new trial was refused by the trial court and its judgment affirmed by said Supreme Court, which said holding was error, because in effect such ruling held that it was necessary for plaintiff in error, in order to assert the denial of such due

process of law and the equal protection of the laws, to subject himself to a second jeopardy, thus depriving plaintiff in error of the right asserted, except on the imposed condition that he surrender the right secured to all persons charged with a criminal offense in the State of Georgia by paragraph Eight of Section One, Article One of the Constitution of the State of Georgia, to-wit, "No person shall be put in jeopardy of life or liberty, more than once for the same offense, save on his or her own motion for a new trial after conviction or in case of mistrial."

XXX.

The said Supreme Court erred in not reversing the judgment of the Superior Court of Fulton County, Georgia, and granting the plaintiff in error therein the rights, privileges and immunities claimed by him in said court under the Fourteenth Amendment to the Constitution of the United States.

XXXI.

The Court erred in holding that a motion to set aside the verdict convicting the plaintiff in error of the crime of murder, because of his involuntary absence, while confined in jail, at the time of the reception of the verdict, was not an available remedy, such ruling depriving him of a substantial right given to him by the law in force at the time to which his alleged guilt related, and at the time of the reception of the verdict, such ruling being an *ex post facto* law within the meaning of Article I, Section 10, of the Constitution of the United States.

Wherefore, for these and other manifest errors appearing in the record, said Leo M. Frank, plaintiff in error, prays that the judgment of the Supreme Court of the State of Georgia be reversed and set aside and held for naught, and

that judgment be rendered the plaintiff in error herein, granting him his rights under the Constitution and laws of the United States.

LEO M. FRANK,
By JOHN L. TYE,
LOUIS MARSHALL,
H. C. PEEPLES,
H. A. ALEXANDER,
HERBERT J. HAAS,
LEONARD HAAS,
Attorneys at Law, for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

LEO M. FRANK

vs.

STATE OF GEORGIA.

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF ERROR.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Leo M. Frank respectfully shows:

1. That he prays to be allowed to file a petition for a writ of error to be directed to the Supreme Court of Georgia.

2. That the Honorable the Chief Justice to whom an application was made after Mr. Justice Lamar, the Justice of the Fifth Circuit, and Mr. Justice Holmes had refused to allow a writ stated that he would refer the application to the Court and petitioner shows that for that reason the application is made.

3. Petitioner files herewith the required number of printed copies of the following papers, to wit:

1. The petition for writ of error, together with an assignment of errors.

2. The opinion of the Supreme Court of Georgia.

3. Two briefs, to one of which are attached the written statements made by the Associate Justices aforesaid denying the writ.

Respectfully submitted,

LEO M. FRANK,

By LOUIS MARSHALL,

HENRY C. PEEPLES,

HENRY A. ALEXANDER,

Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

LEO M. FRANK

v.

THE STATE OF GEORGIA.

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF ERROR.

BRIEF ON MOTION.

HENRY A. ALEXANDER,
Of Counsel for Movant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1914.

LEO M. FRANK

v.

STATE OF GEORGIA.

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF ERROR.

BRIEF FOR THE MOTION.

STATEMENT.

When the verdict convicting Leo M. Frank of murder, who will hereinafter be referred to as the petitioner, was received in court, both he and his counsel were absent, himself being incarcerated in jail. Their absence was due to a private statement made to counsel by the presiding judge just before beginning his charge and without the knowledge of petitioner, that he and counsel would probably be in danger of their lives should they remain in court and the verdict be for acquittal.

A motion for a new trial afterwards made was overruled and the judgment affirmed by the Supreme Court of

Georgia. In this motion, the fact of his absence, while recited, was not made a ground.

Thereafter he filed a motion to set aside the verdict on the ground that the same was null and void, for the reason that his involuntary absence at its reception deprived him of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States; that his right to be present was not waivable by himself or his counsel in any manner whatever, and that the alleged waiver made by his counsel was of no effect because they had no authority to make it and because it was involuntary, having been extorted from them by the extraordinary excitement and terror surrounding the trial and the statement of the judge.

Another ground of the motion set forth the details of the continued and violent demonstrations of hostility against the accused as showing a denial of due process of law under the Fourteenth Amendment; and still another set forth that the same judge, in overruling a motion for a new trial, had declared that he was not convinced of the defendant's guilt.

This motion was dismissed on demurrer and that judgment affirmed by the Supreme Court of Georgia. A few days later it refused to grant a writ of error to this court.

The present petition has been presented successively to Mr. Justice Lamar and to Mr. Justice Holmes who declined to grant the writ. Both gave counsel written statements of their reasons for so declining and copies of these statements are presented herewith. These reasons were, in effect, that no controlling Federal question was presented and this Court had no jurisdiction because the decision of the State court was simply an interpretation of its own local procedure which was a matter over which it had exclusive jurisdiction and which was binding and conclusive upon this court.

ARGUMENT.

Counsel filing this brief believes that a controlling Federal question is presented by this record and that this court has jurisdiction for the following reasons:

Permit us at this point to indicate respectfully exactly where the issue lies between counsel and the views of the Justices who have declined the writ. That can best be done by stating first in what respects we agree with their conclusions, thus narrowing the field of difference. First, then, we agree that the decision of the Supreme Court of Georgia was an adjudication of a point of state procedure, but secondly we submit that the refusal to grant the writ was erroneous because of the failure, as we contend, to give full effect to this feature of the decision, to wit: *that it shows in its face that the Supreme Court of Georgia felt that it could not, and shows that it would not, have come to the conclusion reached, had it not first, as a necessary premise of such conclusion, overruled and denied the petitioner's claim of Federal right.* In other words, while the head and front of the State court's decision was an adjudication of a point of local law, nevertheless that adjudication was predicated upon its views of Federal law, and would never have been made at all had it not entertained those views regarding Federal law. It was only because the Supreme Court of Georgia interpreted the petitioner's claim of Federal right as it did that it was able to come to the conclusion that, under the local law, the petitioner having acquiesced in the waiver made by his counsel had surrendered his rights and was too late. The interpretation of Federal law was the very foundation on which it reared the superstructure of its interpretation of the procedure of the state.

In deciding the case, the Supreme Court of Georgia might have declared that regardless of what might be the

petitioner's Federal rights, and regardless of whether the verdict rendered in his absence was a nullity or an irregularity, and regardless of whether the petitioner's right to be present was waivable or non-waivable, still, whatever these rights might have been, they had been asserted too late and not according to Georgia practice and therefore were lost. If it had done this, it is conceded that its decision would have involved only a matter of local procedure and would not have presented a Federal question. *But this is not what it did.* What it *did* do was something entirely different, to wit: it declared a proposition of local law, not as an independent, self sufficient principle of procedure, but expressly and distinctly as a deduction from an underlying proposition of Federal law. To state the matter more explicitly, the Supreme Court of Georgia, being satisfied with the correctness of its previous ruling in the Cawthorn case, 119 Ga. 396, to the effect that a prisoner on trial for his life could waive his presence at the reception of the verdict, and having determined to adhere to it, simply gave expression to a postulate of that decision and held that such absence was a mere irregularity. In this conclusion, of course, was involved the proposition that the right to be present was waivable. This much being established, it was obvious, under the most elementary principles, that any right a person might have to object would be lost unless the objection were made at the first opportunity, to wit: the filing of a motion for a new trial.

In subhead note (a) of the third main head note (written like all its head notes, by the Court itself) the very use of a subhead note and of the word *"Accordingly"* in introducing it shows that the proposition stated in that subhead note was stated as a corollary of or deduction from the proposition stated in the main head note. The main and subhead notes referred to read as follows, the italics being ours, to wit:

"3. 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. But he may waive formal trial and verdict, and plead guilty, and this includes the power to waive *mere incidents* of trial, such as his presence at the reception of the verdict.

"(*a*) *Accordingly,* where on the trial of one accused of murder the counsel for the accused, at the suggestion of the trial judge, waived the presence of the defendant at the reception of the verdict, without his knowledge or consent, and where the verdict was received and the jury polled by the court when the defendant was not present, but was confined in jail, and the defendant's counsel were also absent; and where it appears that when the defendant was sentenced to suffer death he was present in court in person and by attorneys, and later, within the time allowed by law, made a motion for a new trial, which recited, among other things, his absence at the reception of the verdict and that his presence had been waived by his counsel, and his motion for new trial was refused by the trial court and its judgment affirmed by the Supreme Court, *the defendant will be considered as having acquiesced in the waiver* made by his counsel of his presence at the reception of the verdict, and he cannot at a subsequent date set up such absence as a ground to set aside the verdict in a motion made for that purpose."

It thus appears that while the conclusion reached by the Supreme Court of Georgia was a proposition of procedure, it was only an uncontested deduction necessarily drawn from another and far more radical and disputable proposition about which the real contest had been waged. The real issue—the dominating issue—was whether the right claimed by the petitioner was, as he contended, a great, fundamental right, indispensable to the preservation of human life and liberty, and an integral element of due process of law as

guaranteed by the Constitution of the United States, which neither he nor his counsel could waive by any conduct whatever or, on the other hand, as the State of Georgia contended, a "mere incident" of the trial whose violation was an "irregularity" only. That issue having been joined and having been resolved by the Court in favor of the State's contention, the rest followed as a matter of course. If the right was a "mere incident," its violation, of course, was an irregularity only; and, of course, if it were an irregularity only, it might be waived; and, of course, if it might be waived, objection to any violation in order to be effective and listened to by the courts would have to be made at the very first opportunity. The first proposition being conceded, the rest followed easily and inevitably. There was no room left for further dispute. The principal breastworks of the petitioner's defense having been successfully stormed by the State, the conquest of the remainder of the field was unresisted and perfunctory. In other words, the real battle in the case was waged around one of the underlying premises of the argument, which was a question of Federal law, and there never was and could not have been any contest at all about the conclusion reached (a point of local procedure) once that question of Federal law was determined against the petitioner's contention.

To put the matter in another way, the decision of the Supreme Court of Georgia consists, in its ultimate analysis, of two syllogisms which may be stated as follows:

THE FIRST.

Major premise: That which is an irregularity only may be waived.

Minor premise: The failure to have the petitioner present at the reception of the verdict was an irregularity only.

Conclusion: Therefore, it could be waived.

THE SECOND.

Major premise: A violation of right that may be waived must be taken advantage of at the first opportunity or be lost.

Minor premise: The failure to have the petitioner present at the reception of the verdict was a violation of right that he could waive.

(This premise is the conclusion of the first syllogism.)

Conclusion: Therefore, it was lost by failure to take advantage of it at the first opportunity.

It is apparent that there would not be the slightest room for dispute about the correctness of any of the premises or conclusions stated in the foregoing syllogisms but for one, to wit: *the minor premise of the first syllogism.* As to the correctness of that minor premise there was the

sharpest kind of dispute. *That minor premise is a proposition of Federal law* and it overruled and denied a contention to the contrary made by the petitioner.

Now, it is evidently incorrect to say, because the conclusion of the second of the above syllogisms involves only a point of local procedure, that the Supreme Court of Georgia did not decide a controlling question of Federal low. *Obviously, it did decide a controlling question of Federal law.* It was obliged to do so to reach its conclusion. And that Federal question was the crux of the case. If it had not decided that Federal question as it did, it would not, and it could not have reached the conclusion that the petitioner's rights had been lost by acquiescence in the waiver made by his counsel.

If one will but substitute for the minor premise of the first syllogism the proposition contended for by the petitioner, and then attempt to reach the same conclusion in the second syllogism, it will be quickly seen that that premise was the dominating and controlling factor in the reasoning of the court.

That the Supreme Court of Georgia was fully conscious of the necessity, in order to sustain and justify its conclusion, of first establishing that the absence of the petitioner at the rendition of the verdict was a mere irregularity, is made entirely evident by the manner in which, in the course of its opinion, it labors to do so. Indeed, practically the whole opinion is given up to it except that part in which it states the proposition, which no one disputes, that an objection to a mere irregularity must be made at the first opportunity.

A reading of the opinion shows that it states the proposition that such absence of the petitioner was a mere irregularity in at least eight (8) different ways, as follows:

First: In the third head note (written like all its head notes by the Court itself) it declares in so many words that the presence of the petitioner at the reception of the verdict was a "mere incident" of the trial.

Opinion, page 2, line 9.

Second: It makes the very statement *in haec verbis* that such absence was an "irregularity," and by the phrase (*"if there is one"*) seems to intimate a doubt in its mind if such absence amounted even to an irregularity—probably because it regarded the waiver made by counsel as binding.

Opinion, page 28, line 27.

Third: Mindful of the principle that the illegality of a verdict void for lack of jurisdiction is not waivable by the act of the parties, it expressly negatives the contention of act of the parties, it negatives the contention of the petitioner that his absence deprived the Court of jurisdiction and rendered the verdict void and a nullity, and condemns counsel for "trifling with the court" because they advanced such a contention.

Opinion, pages 9-14, lines 5-9, on page 9; page 24, line 23; page 27, line 16; page 28, lines 2-9.

Fourth: It states the proposition by implication by saying that the right of the petitioner to be present at the reception of the verdict was one that he could waive and which he had waived.

Opinion, page 2, lines 9, 26; page 27, line 13.

Fifth: It also states it by implication by adopting Justice Cobb's personal *obiter* in the Cawthorn case, *supra,* declaring that it was a right counsel could effectually waive,

and this, despite the waiver having been extorted by the demonstrations of a mob.

Opinion, page 24, lines 32-36; page 25, lines 1-6.

Sixth: By adjudicating that the petitioner had been accorded a full opportunity to defend himself and this, although the unanimous voice of the courts of all English speaking peoples has declared for centuries that in a capital case the presence of the accused at the reception of the verdict is an indispensable element of the right to be heard in his own defense.

Opinion, page 1, lines 5-23; pages 9-14.

See pages 94 to 135 inclusive of the brief filed with this as an exhibit, wherein all the authorities on this point are collated, same being one of the briefs filed in behalf of the petitioner when the case was pending in the Supreme Court of Georgia.

Seventh: By its statement treating the case of Lampkin v. State, 87 Ga. 517, as *analogous* to the instant case. The pertinent portion of that case reads as follows:

> "When facts, and a witness by whom they can be proved to manifest the incompetency of a juror, come to the knowledge of counsel for the accused, after the

> jury are sworn but before any further steps in the trial has been taken, the question of the juror's competency should then be raised and submitted to the court. It is not sound practice for counsel to remain silent, take the chances of acquittal for his client and then, after conviction, urge the juror's incompetency as a ground for setting the verdict aside."
>
> Opinion, page 25, lines 6-14.

Eighth: By the second head note and its subhead note (a), by which the Court applies to the facts of this case the principle that an irregularity in procedure must be taken advantage of at the first opportunity, or else be held to have been waived and lost.

In Schlemmer v. Buffalo, Rochester etc. Co., 205 U. S. 1, Mr. Justice Holmes said:

> *"And if it is evident that a ruling purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review."*

We submit that this statement covers this case and demonstrates that this court has jurisdiction. While the conclusion reached by the State court undoubtedly lay within the field of State law, it is equally clear that in reaching it it was compelled to pass, and did, in fact, pass through the domain of Federal law.

Respectfully submitted,

HENRY A. ALEXANDER,

Of Counsel.

OPINION OF MR. JUSTICE LAMAR.

LEO M. FRANK
v.
THE STATE OF GEORGIA.

MOTION TO SET ASIDE VERDICT.

The Record discloses that on August 25, 1913, Frank was found guilty of murder by a jury in the Superior Court of Foulton County, Georgia, he, with the consent of his counsel, being absent from the court room when the verdict was rendered. At the same term he made a motion for a new trial in which the fact of his absence was mentioned, though it was not made a ground of the motion. A new trial was refused and the case taken to the Supreme Court of Georgia, where the judgment was affirmed.

Thereafter, on April 16, 1914, and at a subsequent term of the Superior Court, Frank made a "motion to set aside the verdict." The order denying the same was affirmed by the State Supreme Court and thereupon this application for a writ of error was made.

In its opinion in this case the Supreme Court of Georgia, among other things, held:

1. That under the due process clause of the Fourteenth Amendment to the Constitution of the United States, Frank was entitled to be present in court at every stage of the trial, including the time when the jury returned their verdict.

2. That under the laws of Georgia and the practice of its courts a motion for a new trial is a proper method by which to attack a verdict rendered in the prisoner's absence.

3. That when that method of procedure is adopted, the defendant must set out in the motion for a new trial all

known grounds of objection to the verdict, including the fact that he was absent when it was rendered.

4. That having elected to make a motion for a new trial and the judgment denying the same having been affirmed by the Supreme Court, the defendant could not thereafter make a motion to set aside the verdict on the ground that he had been absent from the court room when the verdict was rendered.

The laws of the several States fix the method in which, and the time at which, to attack verdicts because of anything occurring during the progress of the trial, including disorderly conduct of the crowd in and out of the court room and the fact that the defendant was not present when the verdict was rendered. It is for the States to determine whether a verdict rendered in the absence of the defendant can be attacked by a motion to set aside the verdict, or by a motion for a new trial, or both. The laws of the States also determine whether the denial of one of these motions will prevent the defendant from subsequently making the other. The decision of the Supreme Court of Georgia in this case holds that, under the laws of that State where a motion for a new trial was made and denied, the defendant could not thereafter make a motion to set aside the verdict on the ground that he was not present when it was returned by the jury. That ruling involves a matter of State practice and presents no Federal question. The writ of error is therefore denied.

JOSEPH R. LAMAR,
Associate Justice Supreme Court of the United States.

OPINION OF MR. JUSTICE HOLMES.

FRANK VS. STATE OF GEORGIA—APPLICATION FOR A WRIT OF ERROR.

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, thought by the presiding Judge to be ready for violence unless a verdict of guilty was rendered. I should not feel prepared to deny a writ of error if I did not consider that I was bound by the decision of the Supreme Court of Georgia that the motion to set aside came too late, and even if I thought that the suggestion of waiver was not enough to meet the Constitutional question and the right to bring the case here. I understand from the head-note and the opinion that the case was finished when the previous motion for a new trial was denied by the Supreme Court and, as cases must be ended at some time, that apart from any question of waiver, the second motion came too late. I think I am bound by this decision even if it reverses a long line of cases and the Counsel for the petitioner were misled to his detriment, which I do not intimate to be my view of the case. I have the impression that there is a case in which the ground that I rely on as showing want of due process of law was rejected by the Court with my dissent, but I have not interrupted discussion with Counsel to try to find it, if it exists.

O. W. Holmes,
Justice Supreme Court of the United States.

OPINION OF THE SUPREME COURT OF THE STATE OF GEORGIA.

3 Criminal, October Term, 1914.

FRANK *v.* THE STATE.

By the COURT:

1. Due process of law implies the administration of laws which apply equally to all persons according to established rules, and which are "not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing."

(*a*) Consequently, where one indicted for murder has had full opportunity under the constitution and laws of the State to defend his case in the courts of the State having jurisdiction thereof, in person, by attorney, or both, according to established constitutional rules of procedure, he has been afforded due process of law under the State and Federal Constitutions, which provide that no person shall be deprived of life, liberty, or property without due process of law.

(*b*) And where such opportunity has been, under constitutional laws of the State, afforded without discrimination, he has been accorded the equal protection of the laws.

2. If on the trial of one indicted for murder a verdict of guilty is received in the absence of the prisoner, and without his consent, while he is incarcerated in jail, a motion for new trial is an available remedy in such case, if made in time.

(*a*) But where a motion for a new trial is made by the defendant, with knowledge of the fact that the verdict was rendered in his absence, and such motion does not contain

that fact as a ground for new trial, though it is recited therein, it is too late after the motion for new trial has been denied and the judgment has been affirmed by this court, to make a motion to set aside the verdict on that ground.

3. 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. But he may waive formal trial and verdict, and plead guilty, and this includes the power to waive mere incidents of trial, such as his presence at the reception of the verdict.

(*a*) Accordingly, where on the trial of one accused of murder the counsel for the accused, at the suggestion of the trial judge, waived the presence of the defendant at the reception of the verdict, without his knowledge or consent, and where the verdict was received and the jury polled by the court when the defendant was not present, but was confined in jail, and the defendant's counsel were also absent; and where it appears that when the defendant was sentenced to suffer death he was present in court in person and by attorneys, and later, within the time allowed by law, made a motion for a new trial, which recited, among other things, his absence at the reception of the verdict and that his presence had been waived by his counsel, and his motion for new trial was refused by the trial court and its judgment affirmed by the Supreme Court, the defendant will be considered as having acquiesced in the waiver made by his counsel of his presence at the reception of the verdict, and he can not at a subsequent date set up such absence as a ground to set aside the verdict in a motion made for that purpose.

4. In so far as the motion to set aside the verdict relies on allegations of disorder within and without the court room, and popular excitement as affecting the trial, such matters peculiarly furnish grounds to be included in a motion for a new trial, under the practice in this State. In fact, contentions as to matters of that character were included in the original motion for a new trial, and on examination as to

the facts were ruled against the movant, and the judgment was affirmed by this court.

Leo M. Frank filed his motion in writing, which was afterwards amended, to set aside the verdict of guilty of murder rendered against him in the Superior Court of Fulton County. To this motion the State of Georgia interposed its demurrer, both general and special. On the hearing of the demurrer, and at the conclusion thereof, judgment was rendered by the court on June 6th, 1914, sustaining the demurrer upon each and every ground and dismissing the motion. To this judgment Leo M. Frank excepts and assigns the same as error.

From the motion it appears that the verdict of guilty of murder was received by the court on August 25, 1913, and it was sought to be set aside for the following reasons: At the time the verdict was received, and the jury trying the cause was discharged, the defendant was in the custody of the law and incarcerated in the common jail of the county. He was not present when the verdict was received and the jury discharged, as he had the right in law to be, and as the law required he should be. He did not waive the right to be present, nor did he authorize any one to waive it for him, nor consent that he should not be present. He did not know that the verdict had been rendered and the jury discharged until after the reception of the verdict and the discharge of the jury, and did not know of any waiver of his presence made by his counsel until after the sentence of death had been pronounced upon him. On the day the verdict was rendered, and shortly before the judge who presided at the trial of the cause began his charge to the jury, the judge in the jury room of the court house wherein the trial was proceeding privately conversed with two of the counsel of the defendant, and in the conversation referred to the probable danger of violence that the defendant would be in if he were present when the verdict was rendered if the verdict should be one of acquittal; and after the judge

had thus expressed himself, he requested the counsel thus spoken to to agree that the defendant need not be present at the time the verdict was rendered and the jury was polled. In these circumstances the counsel did agree with the judge that the defendant should not be present at the rendition of the verdict. In the same conversation the judge expressed the opinion also to the counsel that even counsel of the defendant might be in danger if they should be present at the reception of the verdict. In these circumstances defendant's counsel, Rosser and Arnold, did agree with the judge that the defendant should not be present at the rendition of the verdict. The defendant was not present at the conversation and knew nothing about any agreement made, as above stated, until after the verdict was received and the jury was discharged and until after sentence of death was pronounced upon him. Pursuant to the conversation above stated, neither of defendant's counsel were present when the verdict was received and the jury discharged; nor was the defendant present when the verdict was rendered and the jury discharge. Defendant says he did not give counsel, nor anyone else, any authority to waive or renounce the right of the defendant to be present at the reception of the verdict, or to agree that the defendant should not be present thereat; that the relation of client and attorney did not give them such authority, though counsel acted in the most perfect good faith and in the interest of the personal safety of the defendant. Defendant did not agree that his counsel, or either of them, might be absent when the verdict was rendered.

Defendant says upon and because of each of the grounds above stated, the verdict was of no legal effect and was void, and in violation of art. 1, sec. 1, par. 3 of the constitution of the State of Georgia, which provides that "no person shall be deprived of life, liberty or property, except by due process of law." That the reception of the verdict in the "involuntary absence of the defendant" was in violation of and con-

trary to the provisions of art. 6, sec. 18, par. 1 of the constitution of the State of Georgia, which provides that "the right of trial by jury, except where it is otherwise provided in the constitution, shall remain inviolate. That the reception of the verdict in the absence of the defendant was contrary to and in violation of the provisions of the Fourteenth Amendment to the constitution of the United States, to wit: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." That the reception of the verdict in the absence of the defendant was in violation of art. 1, sec. 1, par. 5 of the constitution of the State of Georgia, to wit: "Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel." Because the trial judge (Hon. L. S. Roan), upon considering "the motion for a new trial made by this defendant, after the reception of said verdict, as above stated, rendered his judgment denying said motion and in rendering said jugdment stated that the jury had found the defendant guilty; that he, the said judge, had thought about the cause more than any other he had ever tried; that he was not certain of the defendant's guilt; that with all the thought he had put on this case, he was not thoroughly convinced that Frank was guilty or innocent, but that he did not have to be convinced; that the jury was convinced; that there was no room to doubt that; that he felt it his duty to order that the motion for a new trial be overruled." That the judge in denying to the defendant a new trial in the case, did not, as shown by his statement, give to the defendant the judicial determination of the motion to which the defendant was entitled by law; that the judge being constituted by law as one of the triors did not afford to the defendant the protection which the law guarantees, nor the due process of law. It was alleged that the defendant was denied the due process of law and the equal protection of the laws because the court

room wherein his trial was had had a number of windows on the Pryor Street side, looking out on the public street of Atlanta, and furnishing easy access to any noises that might occur upon the street; that there is an open alley way running from Pryor Street on the side of the court house, and there are windows looking out from the court room into this alley, and that crowds collected therein, and any noises in this alley could be heard in the court room; that these crowds were boisterous, and that on the last day of the trial after the case had been submitted to the jury, a large and boisterous crowd of several hundred people were standing in the street in front of the court house, and as the solicitor general came out greeted him with loud and boisterous applause, taking him upon their shoulders and carrying him across the street into a building wherein his office was located; that this crowd did not wholly disperse during the interval between the giving of the case to the jury and the time when the jury reached its verdict; that several times during the trial the crowd in the court room, and outside of the court room, which was audible both to the court and the jury, would applaud when the State scored a point; a large crowd of people standing on the outside cheering, shouting and hurrahing, and the crowd in the court room signifying their feelings by applause and other demonstrations, and on the trial, and in the presence of the jury, the trial judge in open court conferred with the chief of police of the city of Atlanta and the colonel of the Fifth Georgia Regiment stationed in Atlanta, which had the natural effect of intimidating the jury, and so influencing them as to make impossible a fair and impartial consideration of defendant's case; indeed, such demonstrations finally actuated the court in making the request of defendant's counsel, Messrs. Rosser and Arnold, to have the defendant and the counsel themselves to be absent at the time the verdict was received in open court, because the judge apprehended violence to the defendant and his counsel; and the apprehension of such

violence naturally saturated the minds of the jury so as to deprive the defendant of a fair and impartial consideration of his case, which the constitution of the United States, in the Fourteenth Amendment hereinbefore referred to, entitled him to. On Saturday, August 23rd, 1913, previous to the rendition of the verdict on August 25th, the entire public press of Atlanta appealed to the trial court to adjourn court from Saturday to Monday, owing to the great public excitement, and the court adjourned from Saturday twelve o'clock M. to Monday morning because it felt it unwise to continue the case that day, owing to the great public excitement, and on Monday morning the public excitement had not subsided, and was as intense as it was on Saturday previous. When it was announced that the jury had reached a verdict, the trial judge went to the court room and found it crowded with spectators and fearing violence in the court room, the trial judge cleared it of spectators, and the jury was brought in for the purpose of delivering their verdict. When the verdict of guilty was announced, a signal was given to the crowd on the outside to that effect. The large crowd of people standing on the outside cheered and shouted as the jury was beginning to be polled, and before more than one juror had been polled the noise was so loud and the confusion so great that the further polling of the jury had to be stopped so as to restore order, and so great was the noise and confusion and cheering and confusion from without, that it was difficult for the court to hear the responses of the jurors as they were being polled, though the court was only ten feet distant from the jury. All of this occurred during the involuntary absence of the defendant, he being at the time confined in jail as above set forth. Wherefore, etc.

The State of Georgia, responding to the motion to set aside the verdict, said by way of demurrer that the motion should be dismissed for the following reasons: (1) Because a motion to set aside a verdict or judgment of the court

should be under the law predicated upon some defect appearing on the face of the pleadings or record, and the motion filed is not one predicated upon any defect appearing on the face of the pleadings or the record. (2) Because it affirmatively appears from the motion that the defendant, Leo M. Frank, made a motion for a new trial, which was denied by the court, and as a matter of law if the verdict was rendered at a time when the defendant was not present in court, such irregularity should have been included among the grounds of the motion for a new trial, and as a matter of law is conclusively presumed to have been incorporated and embodied in the motion for a new trial, which motion was heard and denied as shown by the petition. (3) Because the motion shows a course of conduct on the part of the defendant which amounts to an estoppel. And that the motion and the record of the decision of the case of Leo M. Frank against the State, rendered by the Supreme Court of Georgia, affirmatively shows a course of conduct that amounts to and constitutes an estoppel. (4) Because the motion affirmatively discloses that counsel for the defendant agreed with the court that the defendant should not be present at the rendition of the verdict; that this agreement on the part of counsel was and is binding on the defendant, Leo M. Frank, and effectively constitutes a waiver. (5) Because the motion, in conjunction with the decision of the Supreme Court of Georgia in the case of Leo M. Frank against the State of Georgia, affirmatively shows that Frank, after a knowledge of this waiver on the part of his counsel, acquiesced in the same and took steps affirmatively indicating a waiver of such conduct on the part of his counsel. (6) Because the motion affirmatively shows that the jury returning the verdict were polled, and the presence of the defendant is necessary for himself mainly in order to exercise his right to poll the jury. (7) Because the motion and the decision of the Supreme Court of Georgia in the case above named affirmatively discloses that the verdict of guilty

was received in open court and a poll of the jury demanded on behalf of the defendant, and that the poll of the jury was in conformity with every requirement of law.

HILL, *J.* (after stating the foregoing facts):

1. Did the absence of the defendant, under the foregoing statement of facts, at the time that the verdict finding him guilty of murder was received by the court and the jury trying him was discharged, render the verdict void and of no legal effect? It is insisted by the defendant that the reception of the verdict in his involuntary absence, while he was confined in jail was in violation of the due process clauses of the State and Federal constitutions, and that it denied him the equal protection of the laws. "Due process of law, as the meaning of the words has been developed in American decisions, implies the administration of equal laws according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case and proceeding upon notice and hearing. The phrase is and has long been exactly equivalent to and convertible with the older expression 'the law of the land.' The basis of due process, orderly proceedings, and an opportunity to defend, must be inherent in every body of law or custom as soon as it advances beyond the state of uncontrolled vengeance." McGehee on Due Process of Law, 1, citing Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226 (17 Sup. Ct. 581, 41 L. ed. 979). On page 35, this same author says: "Before the passage of the Fourteenth Amendment the security of the citizens of the several States for due process of law in proceedings by the State lay in its institutions alone. Even if due process was denied, the Federal government had no right to interfere. The Fourteenth Amendment changed this condition of affairs. It made it a matter of national concern that the State should not deny due process of law to its citizens and to others. It gave to the United States the right to supervise the perform-

ance of this duty, and transferred from the State to the Federal Supreme Court the ultimate decision on the question of the presence of due process in all proceedings affecting life, liberty and property. But under the amendment the authority of the Federal court is merely to determine whether the state by some official action has provided due process or has failed in that duty; and if a denial of due process appears, it can only pronounce the proceedings void. The power of the Federal government ordinarily ends with that act. Thus the primary duty of providing for the protection of life, liberty and property by due process of law rests still with the States, and the Fourteenth Amendment operates merely as a guaranty additional to the state constitutions against encroachments on the part of the state upon fundamental rights, which their governments were created to secure. It did not radically change the whole theory of the relations of the state and federal governments to each other and of both governments to the people." [See United States *v.* Cruickshank, 92 U. S. 542, (23 L. ed. 588); *In re* Kemmler, 136 U. S. 436-438 (10 Sup. Ct. 930, 34 L. ed. 519).] "The Federal Supreme Court has again and again declared that when the highest court of a state has acted within its jurisdiction and in accordance with its construction of the state constitution and laws, very exceptional circumstances will be necessary in order that the Federal Supreme Court may feel justified in saying that there has been a failure of due process of law. 'We might ourselves have pursued a different course, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference. For especially in cases involving procedure, is it true that 'due process of law means law in its regular course of administration through courts of justice.'" McGehee, Due Process of Law, 167, citing Allen *vs.* Georgia, 166 U. S. 138 (17 Sup. Ct. 525, 41 L. ed. 949), which case is cited with approval in Wilson *v.*

North Carolina, 169 U. S. 586, 595 (18 Sup. Ct. 435, 42 L. ed. 865). In Rawlins *v.* Georgia, 201 U. S. 638 (26 Sup. Ct. 560, 50 L. ed. 899, 5 Ann. Cas. 783), it was contended that because many lawyers, preachers, doctors, engineers, firemen, and dentists were excluded from jury service in Georgia by the jury commissioners failing and refusing to put any of the names of the classes excluded in the jury box, that the defendant had rights under the Fourteenth Amendment. In delivering the opinion of the court in that case, Mr. Justice Holmes said: "At the argument before us the not uncommon misconception seemed to prevail that the requirement of due process of law took up the special provisions of the state constitution and laws into the Fourteenth Amendment for the purposes of the case, so that this court would revise the decision of the state court that the local provisions had been complied with. This is a mistake. If the state constitution and laws as construed by the state court are consistent with the Fourteenth Amendment, we can go no further. The only question for us is, whether a state could authorize the course of proceedings adopted, if that course were prescribed by its constitution in express terms."

In the recent case of Garland *v.* State of Washington, 232 U. S. 642 (34 Sup. Ct. 456), it was held that, "A conviction upon a second and amended information, after a prior conviction under the original information had been set aside and a new trial granted, was not wanting in the due process of law guaranteed by U. S. Const., 14th Amend., because no arraignment or plea was had upon the second information, where, without raising that specific objection before trial, the accused had made certain objections to such information, and was put to a trial thereon before a jury in all respects as though he had entered a formal plea of not guilty." In delivering the opinion of the court (which was unanimous), Mr. Justice Day said in part: "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. Rogers *v.* Peck, 199 U. S. 425, 435 (50 L. ed. 256, 26 Sup. Ct. Rep. 87), 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. . . . Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the accused was entitled to few rights in the prosecution of his defense, when he could not be represented by counsel, nor heard upon his own oath, and when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the Crain case [162 U. S. 625, 16 Sup. Ct. 952, 40 L. ed. 1097], when he said (p. 649): 'Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived that which, under the circumstances, would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of

its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court.' " See Trono *v.* United States, 199 U. S. 521 (26 Sup. Ct. 121, 50 L. ed. 292, 4 Ann. Cas. 773). Authorities might be multiplied to the effect that if the state laws as construed by the state courts are not inconsistent with the provisions of the Fourteenth Amendment, that there is no denial of due process of law within the meaning of that provision of the Federal Constitution.

Art. 1, sec. 1, par. 4 of the constitution of the State of Georgia (Civil Code, §6360) declares that "No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both." By section 6079 of the Civil Code of 1910 it is provided that "The several superior courts of this State shall have power to correct errors and grant new trials in any cause or collateral issue depending in any of the said courts, in such manner and under such rules and regulations as they may establish according to law and the usages and customs of courts." And see sections 6080, *et seq.*, as to the procedure in such cases. Provision is made that cases tried in the superior courts may be reviewed by the Supreme Court, which has appellate jurisdiction to hear and determine all cases civil and criminal that may come before it, and to grant judgments of affirmance or reversal, etc. Civil Code, §6103. And how stands the case with reference to our state constitution and laws as affording the defendant due process of law? Art. 1, sec. 1, par. 3 of the constitution of Georgia (Civil Code, 1910, §5700) provides that "No person shall be deprived of life, liberty or property, except by due process of law." This provision of the State constitution is in substantial accord with the Fourteenth Amendment to the constitution of the United States, which declares

that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Civil Code, §6700. Thus it will be seen that provision has been made in the "law of the land" by which all who are charged with crime can make their defense, and in case of conviction in the trial court, they can make a motion for a new trial in that court on account of any alleged errors which may have been committed in the trial court. If the motion is denied by the trial court, the accused can take the case to the Supreme Court by writ of error, or by direct bill of exceptions, and have the case reviewed. We think it can not be said, therefore, in view of the ample provisions made by the constitution and laws of Georgia for any one accused of crime to exercise his right of defense in our courts, that he is denied "due process of law" or the equal protection of the laws. See Frank *v.* State, 141 Ga. 243 (80 S. E. 1016).

2. In this State a defendant charged with crime and tried by a jury is given the right, by motion for a new trial, to have reviewed a verdict and judgment rendered against him, and have it set aside for an illegality, or irregularity amounting to harmful error, in the trial, including such grounds as the reception of a verdict in his absence. But where such motion is made, it should include all proper grounds which were at the time known to the defendant or his counsel, or which by reasonable diligence could have been discovered. Leathers *v.* Leathers, 138 Ga. 740 (76 S. E. 44). A motion in arrest of judgment is also available to the defendant in a proper case, but a motion in arrest of judgment must be made during the term of court at which the judgment was obtained, and must be predicated upon some defect which appears upon the face of the record or pleadings. Civil Code, 1910, §5958. But this court has decided a number of times that objections to the reception of a verdict in the absence

of the defendant, and to recharging the jury in the absence of the prisoner, and similar alleged errors, can be made in a motion for a new trial. In Wade *v.* State, 12 Ga. 25, the defendant, a verdict for assault with intent to rape being rendered against him, made a motion for a new trial, one of the grounds being that the court read testimony taken down by the court to the jury in the absence of the prisoner, and without consent of the prisoner's counsel. It was held in that case that, "The court has no more authority under the law to read over testimony to the jury, affecting the life or liberty of the defendant, in his absence, than it had to examine the witness in relation thereto in his absence." A new trial was accordingly granted. The court merely treated the ground of the motion for a new trial as an irregularity, and not as a nullity. In Martin *v.* State, 51 Ga. 567, the defendant was indicted for simple larceny, and the court charged the jury the second time in the absence of the defendant and his counsel. This court did not treat the verdict of guilty as a nullity, but said: "As this important privilege was lost to the defendant in this case, and at a critical stage of the trial, through a mistake of the State's counsel, at least it is positively so stated by defendant's counsel, and doubtless the court was misled by it, we think there should be a new trial." Bonner *v.* State, 67 Ga. 510, was an indictment for murder, and there was a conviction for voluntary manslaughter. A motion for a new trial was made, which was overruled and the defendant excepted. A new trial was granted by this court, it being held that, "In a criminal case the prisoner has the right to be present in person throughout the trial. Therefore, for the judge to recharge the jury while the prisoner was absent and in confinement, although his counsel may have been present and kept silent, was error." In Wilson *v.* State, 87 Ga. 583 (13 S. E. 566), there was indictment and trial for murder, and a motion for new trial. The trial court recharged the jury in the absence of the defendant. This court held this to be

cause for a new trial. And to the same effect, see Tiller *v.* State, 96 Ga. 430 (23 S. E. 825); Hopson *v.* State, 116 Ga. 90 (42 S. E. 412).

It will thus be seen that this court has held that a motion for a new trial is an available remedy in a case where during progress of the trial of one charged with a felony some step is taken by the court during the enforced absence of the defendant without his consent, and in such case the verdict rendered against the defendant will not be treated as a nullity, but it will be set aside and a new trial granted. It will also be seen that where a motion for a new trial is made, that the defendant must in his motion for a new trial set out all that is known to him at the time, or by reasonable diligence could have been known by him as grounds for a new trial.

Did the defendant in the instant case know at the time he made his motion for a new trial that he was absent without his consent when the verdict of guilty was rendered against him? He must of necessity have known it, and likewise his counsel. In one ground of his motion for a new trial (which was reviewed and passed on by this court in the case of Frank *v.* State, *supra*), it was alleged: "Defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel." When one convicted of crime makes a motion for a new trial, it is his duty to include everything in it which was appropriate to such a motion and which was known to him at the time. As we have seen, the defendant could have made the question under consideration in the motion for a new trial. In Daniels *v.* Towers, 79 Ga. 785 (7 S. E. 120), a judgment of conviction for felony had been affirmed by the Supreme Court on writ of error brought by the defendant, and this court held that the legality of his conviction could not be brought into question by writ of *habeas corpus* sued out by him, save for the want of jurisdiction appearing on the face of the record as brought from the court below to the Su-

preme Court. In delivering the opinion of the court, Judge Bleckley said (p. 789): "We rest the case upon the general rule that, after a judge of the superior court has presided in any case in the superior court of any county, and the judgment rendered at the trial has been affirmed by this court, it is to be taken for all purposes that it was a legal trial and judgment, and can not be questioned for anything but the want of jurisdiction appearing upon the face of the proceedings as ruled upon here. If there is more record below, and the plaintiff in error after conviction does not bring it up, it is his own misfortune. He had an opportunity to bring it up. He must abide the judgment upon the record which he brings here; and if the judgment is legal according to that record, he must take the consequences. It will not do to allow him to bring up his case in sections, whether there is a trial of it by a court divided in sections or not; he must bring up his whole case as he expects to stand upon it for all time; and if he does not do it, neither he nor his friends can repair the error afterwards."

In support of his contention, the plaintiff cites the case of Hopt *v.* People of Utah, 110 U. S. 574 (4 Sup. Ct. 202, 28 L. ed. 262). Hopt was tried on an indictment for murder, found guilty and sentenced to suffer death. The judgment was affirmed by the Supreme Court of the Territory of Utah. Upon writ of error to the Supreme Court of the United States the judgment was reversed and the case remanded, with instructions to order *a new trial.* A statute of Utah provided that, "If the indictment is for a felony the defendant must be personally present at the trial, but if for a misdemeanor, the trial may be had in the absence of the defendant." The triors of the competency of the jurors, appointed by the court, conducted their examination of the jurors in a different room, and tried the grounds of challenge out of the presence as well of the court as of the defendant and his counsel. The Supreme Court of the United

States, in construing the statute of Utah, said that under their construction the trial, by triors, appointed by the court, of challenges of proposed jurors in felony cases must be had as well in the presence of the court as of the accused; and that such presence cannot be dispensed with. But it will be observed that the decision was placed upon a construction of the statute of Utah which required the *personal* presence of the accused at every stage of the trial. It was said by Mr. Justice Harlan, who delivered the opinion, that "all doubt upon the subject is removed by the express requirement, not that the defendant may, but, where the indictment is for a felony, must be 'personally present at the trial.'" The absence of the defendant, however, was treated as an irregularity, as shown by the judgment remanding the case and ordering that a new trial be had. Ball *v.* United States, 140 U. S. 118 (11 Sup. Ct. 761, 35 L. ed. 377), was also relied upon. In that case it did not affirmatively appear from the record that the defendant was present when sentence was pronounced upon him. It was said that "At common law it was essential in a trial for a capital offense, that the prisoner should be present, and that it should appear of record that he was asked before sentence whether he had anything to say why it should not be pronounced." The defendant was convicted of murder, and filed a motion for new trial, and to arrest the judgment, both on the same date, but whether along with the other motion is not clear. The case was remanded with direction to quash the indictment because it failed to show the time and place of death, p. 133. In delivering the opinion of the court, Chief Justice Fuller said (p. 132): "We do not think that the fact of the presence of the prisoner can by fair intendment be collected from the record, no mention being made to that effect in the order, it not appearing therefrom that the sentence was read or orally delivered to them, and the usual questions not having been propounded." The Chief Justice further said: "We are

clear that the indictment is fatally defective, and that a capital conviction, even if otherwise regular, could not be sustained thereon." While it seems to be the practice in the federal courts, in capital felonies, that the record should show that the defendant was present and was asked whether he had anything to say why sentence should not be pronounced, it has never been the practice in this State "to enter on the record the fact that the prisoner and his counsel were present when the verdict was rendered, and when the sentence was pronounced, and from arraignment to sentence, or that the prisoner was asked, before sentence, whether there was any reason why sentence should not be pronounced upon him. The silence of the record as to such facts is, therefore, no cause for arresting the judgment or setting it aside." Rawlins *v.* Mitchell, 127 Ga. 24 (55 S. E. 958). See also Nolan *v.* State, 53 Ga. 137 (3).

Counsel for the defendant rely on the cases of Nolan *v.* State, 53 Ga. 137, and Nolan *v.* State, 55 Ga. 521 (21 Am. R. 284). In the former case the defendant was indicted for the offense of murder, and the jury found him guilty of voluntary manslaughter. When the jury were out and before the verdict was returned, counsel for the accused consented that if the jury agreed on a verdict that night they could return a sealed verdict to the clerk of the court and disperse. They did not agree that night, but did on the following day, and their verdict was received in the absence of the prisoner and his counsel. The defendant made a motion in arrest of judgment on the ground that the consent extended only in case of agreement that night and not to the next day. It was held that "consent of counsel that should the jury agree that night, they might return a sealed verdict to the clerk and disperse, can not be construed to extend to a verdict found on the next day." "It was the legal right of the defendant to be present when the verdict was rendered, and had a motion to set aside such verdict been made on the ground

of his absence, it should have been granted." By the motion in arrest of judgment the defendant sought to arrest the judgment as a nullity. But the court said that no motion under section 4629 of the Code then in force could be sustained for any matter not affecting the real merits of the offense charged in the indictment. The judgment of the court below overruling the motion in arrest of judgment was therefore affirmed. The court also 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 account of his absence, the motion should have been granted by the court." This last statement, from an examination of the record, is obiter. But what was probably meant by a motion to set aside was in the sense of being a motion for a new trial, as such motions have been likened to motions in arrest and to set aside. See Prescott *v.* Bennett, 50 Ga. 266-272, where Judge Trippe said: "It is true that a motion entitled a motion to set aside, is sometimes made for matters extrinsic the pleadings or record. In such cases, they are practically more to be likened unto motions for new trials, and substantially are the same in form and effect." This is probably what Judge Warner meant by the obiter expression quoted above from the Nolan case; for, from the cases cited in which opinions were delivered prior to that utterance, it will be seen that a motion for a new trial was an available remedy in such cases, and it will be noted, too, that Judge Warner presided and delivered the opinion of the court in the Prescott case, in which Judge Trippe used the language quoted above in his concurring opinion. In the Nolan case decided in 55th Georgia, 521, Nolan was placed on trial for the offense of murder. Evidence was submitted to the jury, argument had and a charge delivered by the court. Subsequently, while the defendant was confined in jail, in the absence of his counsel, and without his consent, the jury returned a verdict finding him guilty of voluntary

manslaughter, and were discharged. The defendant, at a subsequent term, moved to set aside the verdict rendered against him on the ground that it was rendered and published in his absence and without his right of being present having been waived. The trial court ordered accordingly. Subsequently, the defendant was arraigned again upon the same indictment, and he pleaded specially in bar facts as constituting his having been placed once in jeopardy, and claimed his discharge. This court held, that "A verdict so received, having been, on his motion, set aside as illegal, when afterwards arraigned for trial on the same indictment for the offense before another jury, the prisoner may plead specially his former jeopardy in bar of a second trial, and if supported by the record and the extrinsic facts, the plea should be sustained, and, thereupon, the prisoner should be discharged. It will be observed that the defendant in the Nolan case treated the verdict as a nullity and made a motion to set it aside as such, which was done, instead of making a motion for a new trial and setting up his defense as an irregularity and seeking a new trial because of some error committed at the trial. In the latter case, he would waive the fact that the verdict was a nullity, but insist that it was merely irregular or erroneous, requiring a new trial. Judge Bleckley, delivering the opinion in the last Nolan case, said: "One trial, and only one, for each crime, is a fundamental principle in criminal procedure, and must be the general rule practically administered in all countries. For the public authority, whether king or commonwealth, to try the same person over and over again for the same offense, would be rank tyranny. . . . Though some exceptions to the general rule are to be admitted, as when a new trial is had on the prisoner's motion, or when judgment on a void indictment has been arrested, the transcendent importance of the rule itself requires that the exceptions should be few and strictly guarded."

In the instant case, the defendant made a motion for a

new trial, which was overruled by the court (paragraphs 6 and 7 of defendant's motion; also Frank *v.* State, supra), thus treating the verdict not as a nullity, but as an irregularity. In Smith *v.* State, 59 Ga. 513 (27 Am. R. 393), it was held that although the prisoner be in custody he may consent that the verdict shall be received in his absence, and that a verdict thus received was valid, notwithstanding he was at the time confined in jail. The facts in this case were somewhat similar to the Nolan case as to the agreement. The court said: "He ought to have been brought from the jail, so as to be present at the reception. But we think it was merely an irregularity and that no matter of substance was involved. Having surrendered his right to poll the jury, no other of any value to him remained, for the exercise of which his presence was important. Had he been in court, the result must have been the same as it was. Nothing took place in his absence, but the mechanical act of receiving the verdict, as the consent had provided it should be received. If he had been present, the act would have been no less mechanical. In Nolan's case (53 Ga. 137, 55 *ib.* 521), the event contemplated did not happen." We conclude from these authorities that the question here raised could have been adjudicated under a motion for a new trial, and that a failure to include this ground in such motion, would preclude the defendant, after denial of the motion, and the affirmance of the judgment by this court, from seeking to set aside the verdict as a nullity.

3. The motion to set aside the verdict complains of the reception of the verdict in the involuntary absence of the defendant while he was incarcerated in jail, and in the absence of his counsel. Paragraph 2 of the motion avers that he did not waive that right, nor did he authorize anyone to waive it for him, nor did he consent that he should not be present; that he did not know that the verdict had been rendered and the jury discharged until after the reception of the verdict and the discharge of the jury, and that he did

not know of any waiver of his presence made by his counsel until after sentence of death had been pronounced upon him. Paragraph 3 of the motion alleges that on the day the verdict was rendered, and shortly before the judge who presided on the trial of the case began his charge to the jury the judge privately conversed with two of the counsel for the defendant, and in the conversation referred to the probable danger of violence to the defendant and his counsel, if he or they were present when the verdict was rendered and it should be one of acquittal, and after the judge had thus expressed himself, he requested counsel to agree that the defendant should not be present at the time the verdict was rendered and the jury polled; that under these circumstances counsel did agree with the judge that the defendant should not be present at the rendition of the verdict, and he was not present at the rendition of the verdict, nor were his counsel present. It is contended that it is the constitutional right of the defendant to be present at every stage of the trial, and that he can not waive that right, nor can his counsel waive it for him, and that his absence at the reception of the verdict vitiates the whole trial.

It is the undoubted right of a defendant who is indicted for a criminal offense in this State to be present at every stage of his trial. But he may waive his presence at the reception of the verdict rendered in his case. In Cawthorn *v.* State, 119 Ga. 395 (46 S. E. 897), a waiver was made by the defendant's counsel in his presence as to his personal presence at the reception of the verdict. This court held in that case: "8. Even if an attorney, by virtue of the relation of attorney and client existing between himself and one charged with a felony, has no implied right to waive the right of his client to be present at the reception of the verdict, if the attorney makes an express waiver to this effect in the presence of the client, who does not at the time repudiate the action of his counsel, a verdict afterwards received in the absence of the accused and in consequence of the

waiver will not be held to be invalid at the instance of the accused, seeking, after the reception of the verdict, to repudiate the action of his counsel in making the waiver." "9. Before a verdict received in the absence of the accused will be held to be invalid, it is incumbent upon the accused to show that he was in custody of the law at the time the waiver was made, that he made no waiver of his right to be present, and that he did not authorize his counsel to make such waiver for him, and, if an unauthorized waiver has been made by counsel, that he has not ratified the same or allowed the court to act upon the waiver of counsel after he has notice that the same has been made." Judge Cobb, who delivered the opinion of the court in the Cawthon case, after citing a number of authorities, pro and con, said (p. 413): "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. Such a waiver is to all intents and purposes the waiver of the client. It would be trifling with the court to allow it to act upon a waiver thus made, and then impeach its action on the ground that counsel had been guilty of an unauthorized act. And while we recognize fully that there are limitations upon the authority of counsel, the client, even though he be charged with a capital felony, should not be allowed to impeach the authority of his counsel, when he acts in his presence, unless he promptly repudiates the unauthorized act before the court bases action upon it. 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. The reasoning of the courts that hold

to the contrary is not, in my opinion, satisfactory or by any means conclusive. Counsel is generally much better able to take care of the rights of the accused than he is himself, and the accused is better protected from improvident waivers by his case being left to the control of his counsel than if he were to take charge of the same in his own behalf." As said by this court, in effect, in the case of Lampkin *v.* State, 87 Ga. 517 (13 S. E. 523), it is not sound practice for counsel to make a waiver of their client's presence at the reception of the verdict, take the chances of acquittal for their client, and then after verdict of guilty, the defendant should be allowed to repudiate the action of counsel, and employ other counsel to set aside the verdict because of the absence of the defendant at the time it was rendered. Who was better prepared to protect the interests of the defendant, trained and expert counsel, or the defendant himself? True, he had the right to conduct the trial in person, if he so desired; but the defendant had committed his case to able and experienced counsel, who in the exercise of their relation as attorney to the client waived his right to be present, and having made the waiver, and defendant by his conduct having acquiesced in it, he should be bound by it.

In the instant case, the defendant in his motion to set aside the verdict as a nullity says that he did not know of the waiver of his presence made by his counsel. After the verdict of guilty was rendered against him in the trial court, the defendant made a motion for a new trial on various grounds, and the motion being overruled, a writ of error was sued out to this court and the judgment of the lower court affirmed. See Frank *v.* State, *supra.* The 75th ground of that motion contains the following recital, among others, "The defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel." We pause here long enough to say that this court will take judicial notice of its own records, and will of its own motion, or at the suggestion of counsel, inspect

the records of this court in a former appeal of the same case. Strickland *v.* Western & Atlantic R. Co., 119 Ga. 70 (45 S. E. 721); Dimmick *v.* Tompkins, 194 U. S. 540, 548 (24 Sup. Ct. 780, 48 L. ed. 1110) and authorities there cited; Mississinewa Min. Co. *v.* Andrews, 28 Ind. App. 496 (63 N. E. 231); Culver *v.* Fidelity & Dep. Co., 149 Mich. 630 (113 N. W. 9); Studebaker *v.* Faylor, 52 Ind. App. 171 (98 N. E. 318); Mayhew *v.* State (Tex. Crim.), 155 S. W. 191 (5); South Fla. Lumber &c. Co. *v.* Read, 65 Fla. 61 (61 So. 125); Bohanan *v.* Darden, 7 Ala. App. 220 (60 So. 955); Alabama &c. R. Co. *v.* Bates, 155 Ala. 347 (46 So. 776 (2); McNish *v.* State, 47 Fla. 69 (36 So. 176); Westfall *v.* Wait, 165 Ind. 353 (73 N. E. 1089, 6 Ann. Cases, 788); 1 Chamberlyne's Modern Law of Evidence, §683, p. 850.

The motion under review recites that "the said Judge, Hon. L. S. Roan, upon considering the motion for new trial made by this defendant, after the reception of said verdict, as above stated, rendered his judgment denying said motion and in rendering said judgment stated that the jury had found the defendant guilty, etc." When, therefore, the defendant by motion for a new trial invoked from the court a ruling upon alleged errors that had been committed upon the trial (reciting on the face of the motion a knowledge of his absence when the verdict was returned, and the waiver of his presence), he will not now be heard to say that the verdict was a nullity on account of his not being present at its rendition, after the motion for a new trial has been denied and the judgment denying it affirmed by this court. Frank *v.* State, *supra.* And moreover an extraordinary motion for a new trial was made and has likewise been refused and the judgment overruling it affirmed by this court. Frank *v.* State, 142 Ga. — (83 S. E. —.) He had the right to invoke a ruling on that question in the motion for a new trial, and failing to do so, he can not now be heard to say that he will treat the verdict as a nullity and

move to have it set aside as such. It would be a reproach upon the court's administration of the law to allow a defendant to make a motion for a new trial, with a knowledge of his absence when the verdict against him was rendered, and have the grounds of the motion adjudicated by the court, and then move to set the verdict aside as void. The defendant necessarily knew when sentenced by the court, for he was then present, that the verdict had been rendered against him. His counsel must have known it, for they filed his motion for a new trial. He and they are presumed to know the law. His motion for a new trial recited that his presence at the reception of the verdict had been waived by his counsel. Under these circumstances, it must be held that the defendant acquiesced in the waiver by his counsel of his presence at the reception of the verdict. It would be trifling with the court to allow one who had been convicted of a crime, and who had made a motion for a new trial on over a hundred grounds, including the statement that his counsel had waived his presence at the reception of the verdict, and have the motion heard by both the superior and supreme courts, and after a denial by both courts of the motion to now come in and by way of a motion to set aside the verdict include matters which were or ought to have been included in the motion for a new trial. While a defendant indicted for crime in this State has the legal right to be personally present at every stage of his trial, as before stated, there are certain matters which he may waive, and which many prisoners do waive at their trial. They may waive copy of indictment, formal arraignment, and list of witnesses before the grand jury, all of which are important rights. They may waive a preliminary hearing before a committal court; a jury of twelve to try them; or any legal objection to jurors who have qualified on their *voir dire;* they may even waive trial entirely, plead guilty of murder and be sentenced to hang. Sarah *v.* State, 28 Ga. 576 (2), 581; Wiggins *v.* Tyson, 112 Ga. 745, 750 (38 S. E. 86).

These are rights personal to the defendant, and it would be absurd to say that when his counsel had waived his presence at the reception of the verdict, and this waiver had been brought to his attention in ample time for him to move for a new trial on that ground, which he fails to do until after he makes a motion for a new trial, with knowledge of the fact of absence when the verdict was rendered, and then after the motion had been finally adjudicated against him, he could then move to set aside the verdict as a nullity. We may add that the allegations of the petition show that at the rendition of the verdict the jury was polled by the court, under an agreement had with the defendant's counsel when the waiver was made. In this State after a verdict of guilty of murder and the overruling of a motion for a new trial, a writ of error will lie to this court, assigning error on the overruling of the motion. In some jurisdictions the practice is different. But on examination of the cases in other jurisdictions in which a complaint of the reception of a verdict in the absence of the accused was made and sustained, it will be found that very commonly this was treated as a ground for remanding the case for another trial. We know of no provision in the constitution of the United States, or of this State, nor of any statute, which gives to an accused person a right to disregard the rules of procedure in a State, which afford him due process of law, and demand that he shall move in his own way and be granted absolute freedom because of an irregularity (if there is one) in receiving the verdict. If an accused person could make some of his points of attack on the verdict, and reserve other points known to him, which he could then have made, to be used as grounds for further attacks on the verdict, there would be practically no end to a criminal case.

4. Comparing the grounds of the motion to set aside the verdict in this case on the ground of disorder in the court room during the progress of the trial; of cheering and applause outside of the court room; and of the oral remarks

of the trial judge before signing the order denying a new trial, with the grounds of the motion for a new trial made in the former record in this case (see Strickland *v.* W. & A. R. Co. 119 Ga. 70) when it was here under review upon the denial of that motion (Frank *v.* State, 141 Ga. 243), it will be seen that the questions there made as to these matters were substantially the same as those sought to be raised by the present motion, and the questions there raised were adjudicated by this court in that case adversely to the contentions of the defendant. This Court, therefore, will not again consider those same questions when sought to be raised by the motion to set aside the verdict now under review.

Judgment affirmed. All the Justices concur except Fish, C. J., absent on account of sickness.

(27050)

(*Motion to Set Aside Verdict.*)

Fulton Superior Court.

No. 9410.

STATE OF GEORGIA
vs.
LEO M. FRANK.

GEORGIA,
Fulton County:

In the Superior Court of Fulton County, Georgia.

Conviction of Murder.

Motion to Set Aside Verdict.

Now comes Leo M. Frank, the defendant in the above stated cause, against whom in said cause a verdict of guilty of murder was received by the Court on August 25th, 1913, and moves the Court to set aside said verdict for the following reasons:

1.

Because at the time that said verdict was received, and the jury trying the cause was discharged, this defendant was in the custody of the law and incarcerated in the common jail of said County. He was not present when said verdict was received, and the said jury was discharged, as he had the right in law to be, and as the law required that he should be. He did not waive said right, nor did he authorize any one to waive it for him, nor consent that he should not be present. He did not even know that said verdict had been rendered and said jury discharged, until after the reception of the verdict and discharge of the jury, and until after sentence of death had been pronounced upon him.

2.

Because while in point of fact the statements above made are true, yet the presence of this defendant at the reception of said verdict was a legal right of defendant and a requirement of law which could not be waived even by this defendant himself, the charge upon which this defendant was tried being the charge of murder, subjecting him to possible deprivation of his life, and such waiver would be not only a renunciation of a right which the law established in his favor but would be a renunciation affecting the public interest.

3.

Because on the day said verdict was rendered, and shortly before Hon. L. S. Roan, the Judge who presided upon the trial of said cause, began his charge to the jury, the said Judge in the jury room of the court house wherein the trial was proceeding, privately conversed with L. Z. Rosser and Reuben R. Arnold, two of the counsel of this defendant, and in said conversation referred to the probable danger of violence that this defendant would be in if he were present when the verdict was rendered in the cause, if said verdict should be one of acquittal, and after said judge thus expressed himself, he, the said judge, requested said counsel to agree that this defendant need not be present at the time the verdict was rendered and the said jury polled. Under these circumstances the said counsel did agree with the said Judge that this defendant should not be present at the rendition of said verdict. In the same conversation the said Judge expressed the opinion, also, to said counsel that even counsel of this defendant might be in danger of violence if they should be present at the reception of the verdict. Under these circumstances defendant's counsel, said Rosser and said Arnold, did agree with the said Judge that this defendant should not be present at the rendition of the verdict. This defendant was not present at said conversation and knew nothing about the same or of any agreement made, as above stated, until after the verdict was received and the jury discharged, and until after sentence of death was pronounced upon him.

Pursuant to the conversation above stated, neither the said Rosser, nor the said Arnold, nor Herbert J. Haas, nor Morris Brandon who were the sole counsel of this defendant in said cause, were present when the said verdict was received and said jury discharged; nor was this defendant present when said verdict was rendered and the said jury discharged. Defendant says: (1) He did not give to said counsel, the said Rosser and the said Arnold nor to anyone else, any authority to waive or renounce the right of this defendant to be present at the reception of said verdict, or to agree that this defendant should not be present thereat; and the relation of attorney and client did not give them such authority, though said counsel acted in the most perfect good faith and in the interest of the personal safety of this defendant. Neither the said conversation, with Judge Roan, nor the purport thereof, was communicated to said Haas, nor did said Haas know thereof until after sentence was pronounced on defendant. (2) Defendant did not give to said Rosser, nor to said Arnold, nor to said Haas or Brandon any authority themselves to be absent when said verdict was received, nor did he agree that they or either of them might be so absent. (3) The said agreement made by the said Rosser, and the said Arnold, even if otherwise it could be of any binding force and effect, upon this defendant, was of no legal force and effect, so far as the presence of this defendant at the reception of said verdict was concerned, because the same was made under and because of the said statement, made as above stated to the said Rosser and the said Arnold by the Judge who was

presiding upon and at said trial, that there was probable danger of violence to this defendant should he be present when said verdict was rendered, should the verdict be one of acquittal and because they, the said Rosser and the said Arnold were induced to make said agreement because of said statement so made to them, believing the same to be true and believing that for this defendant to be so present, if the verdict should be one of acquittal, might subject this defendant to serious bodily harm and even to the loss of his life.

4.

Defendant says upon and because of each of the grounds above stated and, also, and upon and because of, all of them, the said verdict was and is of no legal force and effect and the same is void. (1) That the reception of said verdict, in the involuntary absence of this defendant, while he was so, as aforesaid, in the custody of the law and incarcerated in jail, was contrary to law and was in violation of the legal rights of this defendant. (2) Defendant says that the reception of said verdict in the involuntary absence of this defendant while he was so confined in jail, was in violation of and contrary to the provisions of Art. 1, Sect. 1, Par. 3 of the Constitution of the State of Georgia, providing that "no person shall be deprived of life, liberty or property, except by due process of law", the said reception of said verdict during the involuntary absence of this defendant and while he was confined in jail depriving the proceedings against him of the character of a trial to which he was entitled under the law and depriving him of the hearing and the opporutnity to be heard, in his own defense to which he was entitled under the law and to which he was entitled under the said provision of the constitution of the State of Georgia. (3) Defendant says that the said reception of said verdict in the involuntary absence of this defendant while he was so confined in jail, was in violation of and contrary to the provisions of Art. 6, Sec. 18, Par. 1 of the Constitution of the State of Georgia, that "The right of trial by jury, except where it is otherwise provided in the Constitution, shall remain inviolate", because the right of trial by jury under the laws of the State of Georgia extended to and covered with its protection the right of this defendant to be present in person at the reception of the verdict against him in said cause, and because the reception of said verdict during the involuntary absence of this defendant and while he was so confined in jail was in violation of the right of trial by jury to which this defendant was entitled, said right including the right of this defendant to be present at the reception of the said verdict and to be then and there heard in his own defense. (4) Defendant says that the said reception of said verdict in the involuntary absence of this defendant while he was so confined in jail, tended to deprive him of his life and liberty without due process of law, and that the same denied to him the equal protection of the laws, contrary to and in violation of the provisions of the (14th) Fourteenth Amendment to the Constitution of the United States, to-wit: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any

person within its jurisdiction the equal protection of the laws," the said reception of said verdict during the involuntary absence of this defendant and while he was confined in jail depriving the proceedings against him of the character of a trial to which he was entitled under the law and depriving him of the hearing and the opportunity to be heard in his own defense to which he was entitled under the law and to which he was entitled under the said provision of the Constitution of the United States; and this defendant claims the protection of said provision.

5.

Defendant says that the said reception of said verdict in the involuntary absence of this defendant and while he was so incarcerated in jail, and in the said absence of this defendant's counsel under the circumstances as above stated, was contrary to and in violation of the provisions of Art. 1, Sec. 1, Par. 5, of the Constitution of the State of Georgia, to-wit: "Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel," because this defendant under and because of the said circumstances as above set forth was deprived of the presence of his counsel and of the benefit of counsel at the reception of said verdict, to which he was in law and under said constitutional provision entitled; and for and because of the same said conditions and circumstances the reception of said verdict was in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" in that this defendant was under the said conditions and circumstances deprived of the right to the benefit of counsel and of the presence of his counsel at the reception of said verdict, and defendant claims the protection of the said amendment.

6.

Because the said Judge Hon. L. S. Roan, upon considering the motion for a new trial made by this defendant, after the reception of said verdict as above stated, rendered his judgment denying said motion and in rendering said judgment stated that the jury had found the defendant guilty; that he, the said Judge, had thought about this cause more than any other he had ever tried; that he was not certain of the defendant's guilt; that with all the thought he had put on this case, he was not thoroughly convinced that Frank was guilty or innocent, but that he did not have to be convinced; that the jury was convinced; that there was no room to doubt that; that he felt it to be his duty to order that the motion for a new trial be overruled. This defendant says that under the provisions of the Fourteenth Amendment to the Constitution of the United States, no State could deprive this defendant of his life or liberty without due process of law, nor deny him the equal protection of the laws, and that he has not been afforded due process of law, and that he has

been denied the equal protection of the laws, in that the said Judge, in so as aforesaid denying to him a new trial in said cause, did not, as shown by his said statement, give to this defendant the judicial determination of said motion to which defendant was entitled by law; that said Judge, being constituted by law as one of the triors did not afford to this defendant the protection which the law guarantees, the law being that defendant is entitled to the benefit of every reasonable doubt, the presumption of innocence being in defendant's favor, and the trial judge, though entertaining the doubt which he felt as to this defendant's guilt, and nevertheless denying to him a new trial, by said action denied to this defendant the fair and lawful trial he is entitled to, and thereby this defendant has been denied the due process of law.

7.

Because that fair and impartial trial was not accorded defendant which is guaranteed to him by the Constitution of the United States, as contained in the Fourteenth Amendment to said Constitution, to-wit: "nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." In support of this ground movant alleges that the court room wherein this trial was had had a number of windows on the Pryor street side looking out on a public street of Atlanta, and furnishing easy access to any noises that might occur upon the street; that there is an open alley way running from Pryor Street on the side of the court house, and there are windows looking out from the court room into this alley, and that crowds collected therein, and any noises in this alley could be heard in the court room; that these crowds were boisterous, and that on the last day of the trial after the case had been submitted to the jury, a large and boisterous crowd of several hundred people were standing in the street in front of the court house, and as the Solicitor General came out greeted him with loud and boisterous applause, taking him upon their shoulders and carrying him across the street into a building wherein his office was located; that this crowd did not wholly disperse during the interval between the giving of the case to the jury and the time when the jury reached its verdict, but during the whole of such time a large crowd was gathered at the junction of Pryor and Hunter streets; that several times during the trial the crowd in the court room, and outside of the court room, which was audible both to the court and jury, would applaud when the State scored a point; a large crowd of people standing on the outside cheering, shouting and hurrahing, and the crowd within the court room signifying their feelings by applause and other demonstrations, and on the trial and in the presence of the jury, the trial judge in open court conferred with the Chief of Police of Atlanta, and the Colonel of the Fifth Georgia Regiment stationed in Atlanta, which had the natural effect of intimidating the jury, and so influencing them as to make impossible a fair and impartial consideration of defendant's case; indeed, such demonstrations finally actuated the Court in making the request

of defendant's counsel, Messrs. Rosser and Arnold, as detailed in paragraph three of this motion, to have defendant, and the counsel themselves to be absent at the time the verdict was received in open court, because the Judge apprehended violence to defendant and his counsel; and the apprehension of such violence naturally saturated the minds of the jury so as to deprive this defendant of a fair and impartial consideration of his case, which the Constitution of the United States in the Fourteenth Amendment hereinbefore referred to, entitled him to.

On Saturday, August 23rd, 1913, previous to the rendition of the verdict on August 25th, the entire public press of Atlanta appealed to the trial court to adjourn court from Saturday to Monday, owing to the great public excitement, and the Court adjourned from Saturday, 12:00 o'clock M., to Monday morning, because he felt it unwise to continue the case that day, owing to the great public excitement, and on Monday morning the public excitement had not subsided, and was as intense as it was on Saturday previous. And when it was announced that the jury had reached a verdict, the trial judge went to the court room and found it crowded with spectators, and fearing violence in the court room, the Trial Judge cleared it of spectators, and the jury was brought in for the purpose of delivering their verdict. When the verdict of guilty was announced, a signal was given to the crowd on the outside to that effect. The large crowd of people standing on the outside cheered and shouted as the jury was beginning to be polled, and before more than one juror had been polled, the noise was so loud and confusion so great that the further polling of the jury had to be stopped so as to restore order and so great was the noise and cheering and confusion from without that it was difficult for the court to hear the responses of the jurors as they were being polled, though the court was only ten feet distant from the jury. All of this occurred during the involuntary absence of this defendant, he being at the time in the custody of the law and incarcarated in Fulton County jail, his absence from the court room having been requested by the Court on account of fear of violence to said defendant as here-before recited.

Wherefore the premises considered, the defendant prays that the said verdict be set aside and go for naught. Defendant prays that a rule be granted calling upon the State of Georgia, by its Solicitor General, to show cause at a time to be fixed by the Court, why the prayers of this petition should not be granted, and that in the meantime and until the further order of this Court the execution of the sentence of death which has been pronounced against this defendant be stayed.

TYE, PEOPLES & JORDAN,
HENRY A. ALEXANDER,
LEONARD HAAS,
HERBERT J. HAAS,
Counsel for Leo M. Frank.

STATE OF GEORGIA,
County of Fulton:

In person appeared before me Leo M. Frank, who being duly sworn says; He has read the motion above set forth and is familiar with the contents thereof. Deponent says that each and all of the statements thereof as to anything which was done or said by this deponent and as to anything within the knowledge of this deponent are true. Deponent says that all the other statements made in said motion he is informed and believes are true.

LEO M. FRANK.

Sworn to and subscribed before me, this 15th day of April, 1914.
MONTEFIORE SELIG,
N. P., Fulton County, Ga.

The above motion being presented and read, it is ordered that the same be filed and a copy thereof be served upon Hugh M. Dorsey, Esq. as Solicitor General of the Atlanta Circuit, and that the State of Georgia, by its said Solicitor General, show cause before me on the 23rd day of April 1914, at 10 o'clock A. M. or as soon thereafter as the hearing can be had, why the prayers of said motion should not be granted. In the meantime and until the further order of the Court, the execution of the sentence of death which has been passed upon the defendant be and it is hereby stayed.
This April 16, 1914.

BENJ. H. HILL,
Judge, Fulton Superior Court.

Filed in office this the 16th day of April 1914 At 10:40 A. M.
JOHN H. JONES,
Deputy Clerk.

Service acknowledged, April 18th, 1914.
E. A. STEPHENS.
HUGH M. DORSEY,
Sol. Gen'l.

(*Amended Motion.*)

GEORGIA,
Fulton County:

Now comes Leo M. Frank, and, with leave of the Court, amends his above stated motion as follows: By inserting between the word "and" and the words "until after sentence of death," in the last sentence of the paragraph numbered one of said motion, the words "did not know of any waiver of his presence made by his Counsel", so that said sentence as amended will read:

"He did not even know that said verdict had been rendered and said jury discharged until after the reception of the verdict and discharge of the jury, and did not know of any waiver of his presence

made by his counsel until after sentence of death had been pronounced upon him."

TYE, PEOPLES & JORDAN,
H. A. ALEXANDER,
LEONARD HAAS,
HERBERT J. HAAS,
Att'ys for Leo M. Frank.

The above amendment allowed. This June 6, 1914.

B. H. HILL,
Judge Superior Court, Atlanta, Georgia.

Service above amendment acknowledged. Copy received. This June 6, 1914.

HUGH M. DORSEY,
Solicitor General, Atlanta Circuit.

Filed in office this the 6th day of June, 1914.

JOHN H. JONES, *D. Clerk.*