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 concern 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 or 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, 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 (*Rec. p. 22*) 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 lib-

erty. 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, whch 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 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, sought 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 and of depriving one whose life is sought to be taken from him without due process of law of having his constitutional right vindicated by this court.

VI.

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.

In view of the history of Georgia procedure, the decision rendered by the State Supreme Court on the application to set aside the verdict was 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, 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.*

This subject will receive further consideration under Point VIII.

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 its 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.

By the *Laws of Georgia, Acts of 1858, p. 74* (embodied in *Georgia Code* of *1882 as § 217*), referring to the Supreme Court, it is provided:

"A decision concurred in by three judges cannot be reversed or materially changed except by a full bench, and then after argument had, in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argument the court, in its decision, shall state distinctly whether it affirms, reverses or changes such decision."

Under this act, it was held that the decision of the full bench was converted into a statute, and that a unanimous decision of the Supreme Court is as binding as an act of the Legislature. (*28 Ga. 597; 30 Ga. 202; 59 Ga. 54.*)

The *Code of Georgia of 1910, § 6207,* provides:

"A decision rendered by the Supreme Court prior to the first day of January, 1897, and concurred in by three judges, or justices, cannot be reversed or materially changed except by the concurrence of at least five justices. Unanimous decisions rendered after said date by a full bench of six shall not be overruled or materially modified except with the concurrence of six justices, and then after argument had, in which the decision, by permission of the court, is expressly questioned and reviewed; and after such argu-

ment, the court, in its decision shall state distinctly whether it affirms, reverses, or changes such decision."

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 decisions of this Court.

VII.

It follows from the propositions thus far discussed that appellant's application for a writ of habeas corpus is squarely based on the contention that, when the verdict against him was received and judgment was rendered against him the Court had lost such jurisdiction as it previously possessed, and the verdict and judgment under which he was detained were absolute nullities, thus making habeas corpus the proper remedy to test the validity of his detention thereunder.

We concede that a writ of habeas corpus can not be made to perform the office of a writ of error. Irregularities and erroneous rulings on the trial, however egregious, are not reviewable by *habeas corpus*. But it is equally clear, that where the judgment under which a prisoner is detained, lacks jurisdiction in the court which pronounced it, whether wanting *ab initio* or lost in the course of the proceedings against him, it is a nullity, the pronouncement is unlawful, and the writ of *habeas corpus* is the indicated remedy for relief from the unlawful imprisonment.

Section 751 of the United States Revised Statutes provides:

"The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus."

Section 752 declares:

"The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of inquiry into the cause of restraint of liberty."

Section 753 continues:

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he . . . is in custody in violation of the Constitution or of a law or treaty of the United States."

Sections 754-756 of the United States Revised Statutes regulate the procedure on such an application.

As we have already shown, in the present case our contention is, that the appellant is in custody in violation of the Constitution of the United States, in that the rendition of a judgment condemning him to death, based on a verdict received in his absence, is not due process of law.

As indicating the distinction between cases which deal with mere irregularities and those which involve an absolute nullity, the opinion in *Matter of Hans Nielsen, 131 U. S. 176,* is most valuable. That case came here on an appeal from a final order of the District Court of Utah Territory, which denied an application for a writ of *habeas corpus.* The petitioner had been twice indicted, once for unlawful cohabitation, and once for adultery. He pleaded guilty to the first of the indictments, and was fined. He was then arraigned on the indictment for adultery and pleaded that he had already been convicted of the offense charged, by his plea of guilty to the first indict-

ment. He was nevertheless convicted and sentenced to imprisonment. He then sued out a writ of *habeas corpus*, on the ground that the court was without authority to impose sentence upon him, because by doing so he had been denied a constitutional right. This Court sustained his contention, reversing the judgment of the District Court. In the course of his opinion Mr. Justice Bradley said:

"The first question to be considered is, whether, if the petitioner's position was true, that he had been convicted twice for the same offense, and that the court erred in its decision, he could have relief by *habeas corpus*. The objection to the remedy of *habeas corpus*, of course, would be, that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on *habeas corpus*. But there are exceptions to this rule which have more than once been acted upon by this court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstituional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*. This was so decided in the case of *Ex parte Lange, 18 Wall. 163*, and *Ex parte Siebold, 100 U. S. 371*, and in several other cases referred to therein. In the case of *In re Snow, 120 U. S. 274*, we held that only one indictment and conviction of the crime of unlawful cohabitation, under the act of 1882, could be had for the time preceding the finding of the indictment, because the crime was a continuous one, and was but a single crime until prosecuted; that a second conviction and punishment of the same crime, for any part of said period, was an excess of authority on the part of

the District Court of Utah, and that a *habeas corpus* would lie for the discharge of the defendant imprisoned on such conviction. In that case, the *habeas corpus* was applied for at a term subsequent to that at which the judgment was rendered; but we did not regard this circumstance as sufficient to prevent the prisoner from having his remedy by that writ.

"It is true that, in the case of Snow, we laid emphasis on the fact that the double conviction for the same offense appeared on the *face* of the judgment; but if it appears in the indictment, or anywhere else in the record, of which the judgment is only a part, it is sufficient. In the present case it appeared in the record in the plea of *autre fois* convict, which was admitted to be true by the demurrer of the Government. We think that this was sufficient. It was laid down by this court in *In re Coy, 127 U. S. 731, 758,* that the power of Congress to pass a statute under which a prisoner is held in custody may be inquired into under a writ of *habeas corpus* as affecting the jurisdiction of the court which ordered his imprisonment; and the court, speaking by Mr. Justice Miller, adds: 'And if their want of power appears on the face of the record of his condemnation, whether in the indictment or elsewhere, the court which has authority to issue the writ is bound to release him'; referring to *Ex parte Siebold, 100 U. S. 371.*

"In the present case, it is true, the ground for the *habeas corpus* was, not the invalidity of an act of Congress under which the defendant was indicted, but a second prosecution and trial for the same offense, contrary to an express provision of the Constitution. In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a

valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant. This was the case in *Ex parte Lange,* where the court had authority to hear and determine the case, but we held that it had no authority to give the judgment it did. It was the same in the case of Snow; the court had authority over the case, but we held that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision, securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment. The distinction between the case of a mere error in law, and of one in which the judgment is void, is pointed out in *Ex parte Siebold, 100 U. S. 371, 375,* and is illustrated by the case of *Ex parte Parks,* as compared with the cases of Lange and Snow. In the case of Parks there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the cases of Lange and Snow, there was a denial or invasion of a constitutional right. A party is entitled to a *habeas corpus,* not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. As said by Chief Baron Gilbert, in a passage quoted in *Ex parte Parks, 93 U. S. 18, 22,* 'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge.' This was said in reference to cases which had gone to conviction and sentence. Lord Hale laid down the same doctrine in almost the same words. 2 Hale's Pleas of the Crown, 144. And why should not such a rule prevail *in favorem libertatis?* If we have seemed to hold the contrary in any case, it has been from inadvertence. The law could hardly

be stated with more categorical accuracy than it is in the opening sentence of *Ex parte Wilson, 114 U. S. 417, 420,* where Mr. Justice Gray, speaking for the court, said: 'It is well settled by a series of decisions that this court, having no jurisdiction of criminal cases by writ of error or appeal, cannot discharge on *habeas corpus* a person imprisoned under the sentence of a circuit or district court in a criminal case unless the sentence exceeds the jursdiction of that court, or there is no authority to hold him under the sentence.' This proposition, it is true, relates to the power of this court to discharge on *habeas corpus* persons sentenced by the Circuit and District courts; but, with regard to the power of discharging on *habeas corpus,* it is generally true that, after conviction and sentence, the writ only lies when the sentence exceeds the jurisdiction of the court, or there is no authority to hold the defendant under it. In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction."

Without quoting from it, attention is directed to the decision in *Ex parte Bain, 121 U. S. 1,* especially to the reasoning on pages 13 and 14 of the opinion; also to the various cases which are cited in the opinion of Mr. Justice Bradley (*supra*).

In re Bonner, 151 U. S. 242, 256, Mr. Justice Field, in support of the granting of a writ of *habeas corpus,* said:

"We are * * * of opinion that in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its au-

thority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms. There has been a great deal said and written, in many cases with embarrassing looseness of expression, as to the jurisdiction of the courts in criminal cases. From a somewhat extended examination of the authorities we will venture to state some rule applicable to all of them, by which the jurisdiction as to any particular judgment of the court in such cases may be determined. It is plain that such court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void. Proceeding within these limitations, its action may be erroneous, but not void.

To illustrate: In order that a court may take jurisdiction of a criminal case, the law must, in the first instance, authorize it to act upon a particular class of offenses within which the one presented is embraced. Then comes the mode of the presentation of the offense to the court. That is specifically prescribed. If the offense be a felony, the accusation in the Federal court must be made by a grand jury summoned to investigate the charge of the public prosecutor against the accused. Such indictment can only be found by a specified number of the grand jury. If not found by that number, the court cannot proceed at all. If the offense be only a misdemeanor, not punishable by imprisonment in the penitentiary, *Mackin v. United States, 117 U. S. 348,* the accusation may be made by indictment of the grand jury or by information of the public prosecutor. An information is a formal charge against the accused of the offense, with such particulars as to time, place, and attendant circumstances as will

apprize him of the nature of the charge he is to meet, signed by the public prosecutor. When the indictment is found, or the information is filed, a warrant is issued for the arrest of the accused to be brought before the court, unless he is at the time in custody, in which case an order for that purpose is made, to the end, in either case, that he may be arraigned and plead to the indictment or information. When he is brought before the court, objections to the validity or form of the indictment or information, if made, are considered, or issue is joined upon the accusation. When issue is thus joined, the court must proceed to trial by a jury, except in case of the accused's confession. It cannot then proceed to determine the issue in any other way. When the jury have rendered their verdict, the court has to pronounce the proper judgment upon such verdict—and the law, in prescribing the punishment, either as to the extent, or the mode, or the place of it, should be followed. If the court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is void for the excess. If the law prescribes a place of imprisonment, the court cannot direct a different place not authorized; it cannot direct imprisonment in a penitentiary when the law assigns that institution for imprisonment under judgments of a different character. If the case be a capital one, and the punishment be death, it must be inflicted in the form prescribed by law. Although life is to be extinguished, it cannot be by any other mode. The proposition put forward by counsel that if the court has authority to inflict the punishment prescribed, its action is not void, though it pursues any form or mode which may commend itself to its discretion, is certainly not to be tolerated. Imprisonment might be accompanied with inconceivable misery and mental suffering, by its solitary character or other attending circumstances. Death might be inflicted by torture, or by starvation, or by drawing and quartering. All these modes, or any of them, would be permissible, if the doctrine asserted by him can be maintained.

Although at first blush they may appear to be cases against us, in reality, the decisions in *Felts* v. *Murphy, 201 U. S. 123* and *Valentina* v. *Mercer, 201 U. S. 131,* are strongly in our favor.

The first of them was an appeal from the Circuit Court of the United States for the Northern District of Illinois, where the petitioner, who had been convicted of murder in the State court, sought to be discharged on *habeas corpus* on the ground that he was so deaf that he could not hear the proceedings on his trial, and that therefore he was deprived of his liberty without due process of law. The court recognized the doctrine in the *Nielsen case,* and distinguished it, by pointing out that in the case under consideration the trial court had at most been guilty of a mere irregularity, hence there was no question of the absense or loss of jurisdiction. Mr. Justice Peckham said, after stating the grounds urged on behalf of the petitioner:

"But upon this writ the question for our determination is simply one of jurisdiction. If that were not lacking at the time of the trial *and if it continued all through,* then the application for the writ was properly denied by the Circuit Court, and its order must be affirmed. The writ cannot perform the function of a writ of error."

It is important to note this qualification: "If it (jurisdiction) continued all through." It is our contention that in our case jurisdiction ceased when the appellant was kept out of court at the time of the reception of the verdict and when the domination of the trial by the mob became effective. Although jurisdiction over him and of the cause existed up to that time, it did not con-

tinue all through the trial, but was lost, and he was deprived of his day in court.

In *Valentina* v. *Mercer* (*supra*), which came to this Court on appeal from a denial by the Circuit Court of the United States for the District of New Jersey, of a suit of *habeas corpus* after the prisoner had been convicted of murder in the State court of New Jersey, it was claimed that the prisoner was deprived of a constitutional right, of a very shadowy character, founded on the phraseology of the charge addressed by the trial court to the jury. Here, too, Judge Peckham said:

"Our power to interfere in cases of this nature is limited entirely to the question of jurisdiction. If the State court had jurisdiction to try the case, and had jurisdiction over the person of the accused, *and never lost such jurisdiction*, the Federal Circuit Court was right in denying the application of the petitioner for a writ, and its order must be affirmed."

In *Rogers* v. *Peck, 199 U. S. 425,* which was also brought here on an appeal from a denial of a writ of *habeas corpus* by the District Court of the United States for the District of Vermont, by which relief was sought from a judgment of conviction rendered in the State Court of Vermont, Mr. Justice Day said:

"The reluctance with which this court will sanction Federal interference with a State in the administration of its domestic law for the prosecution of crime has been frequently stated in the deliverances of the court upon the subject. *It is only where fundamental rights, specially secured by the Federal Constitution, are invaded, that*

such interference is warranted." (Citing various cases.)

Nowhere has the principle for which we contend been more clearly stated than it was by Mr. Justice Bradley in *Ex parte Bridges, 2 Woods 428, s. c. 4 Fed. Cas. 105, 106.* There Bridges, who was confined in the Georgia State Penitentiary on a conviction in the Superior Court of Randolph County, Georgia, upon an indictment for perjury committed in the course of a judicial investigation conducted under authority of Congress, petitioned for a writ of *habeas corpus* on the ground that the offense was against the public justice of the United States and was exclusively cognizable in the Federal Courts. His contention was sustained, and in the course of his opinion that great jurist said:

"The court had no jurisdiction of the case. The proceedings were null and void. It is contended, however, that where a defendant has been regularly indicted, tried and convicted in a state court, his only remedy is to carry the judgment to the court of last resort, and thence by writ of error to the supreme court of the United States, and that it is too late for a *habeas corpus* to issue from a federal court in such a case. This might be so if the proceeding in the state court were merely erroneous; but where it is void for want of jurisdiction, *habeas corpus* will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case. *Ex parte Lange, 18 Wall (85 U. S.) 163.* As a general rule, when it appears by a return to a habeas corpus that the prisoner is confined upon a regular charge and commitment for a criminal offense, and especially if he be confined in execution after a conviction, he will be at once returned into custody, it being presumed that the court having

such custody has examined, or will examine and lawfully determine the case; and, at all events, that its judgment will be subject to such regular proceedings for review as is provided by law.

"In addition to this cautionary and conservative rule of the common law, the fourteenth section of the judiciary act of 1789 provided that the writ should in no case extend to prisoners in jail, unless where they were in custody under or by color of the authority of the United States, or were committed for trial before some court of the same, or were necessary to be brought into court to testify. *1 Stat. 82.* This provision prevented its application to persons imprisoned under state process. (But the general rule does not apply where the order of commitment is made by tribunal or officer having no jurisdiction to make it; and the proviso of the 14th section of the judiciary act has been greatly modified.) The benefit of the writ may now be had by prisoners in jail, not only when in custody under authority of the United States, but in 1833, when the nullification proceedings were adopted in South Carolina, it was extended to those in custody for an act done in pursuance of a law of the United States, or of a judgment of any of its courts. *4 Stat. 634.* The primary object of this statute was to protect the revenue officers in carrying out the acts of congress. In 1842, when the complications growing out of the McLeod Case, and the Canada rebellion occurred, it was extended to foreigners acting under the authority and sanction of their own government. *5 Stat. 539.* This was to prevent a single state, as was done by New York in that case, from interfering with our foreign relations.

"In view of our late civil strife, and the necessity of protecting those who claim the benefit of the national laws, congress, by the act of February 5, 1867, extended the writ to 'all cases where any person may be restrained of his or her liberty

in violation of the constitution, or of any treaty or law of the United States,' and made it issuable by 'the several courts of the United States, and the several justices and judges of said courts within their respective jurisdiction.' *14 Stat. 385.* The present case clearly belongs to the last category. The relator was certainly 'restrained of his liberty in violation of a law of the United States.' And although it may appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on *habeas corpus,* there seems to be no escape from the law. If it were a case in which the state court had *jurisdiction* of the offense, the general rule of the common law would intervene, and require that the prisoner should be remanded, and left to his writ of error. In such a case, although the judgment were erroneous, the imprisonment would not be in violation of the constitution or laws of the United States. The judgment might be wrong, but the imprisonment under it would be right until the judgment was reversed. But, as before shown, *the state court had not jurisdiction of the offense.*''

In *McClaughry* v. *Deming, 186 U. S. 49,* Mr. Justice Peckham cited with approval from the opinion in *Oakley* v. *Aspinwall, 3 N. Y. 547,* the following, in support of a decision sustaining a proceeding in habeas corpus on the ground of the illegality of a trial by court martial:

''It was, however, urged at the bar, that although the judge were wanting in authority to sit and take part in the decision of this cause, yet, that having done so at the solicitation of the respondent's counsel, such consent warranted the judge in acting, and is an answer to this motion. But where no jurisdiction exists by law it cannot be conferred by consent—especially against the prohibition of a law—which was not designed

merely for the protection of a party to a suit, but for the general interests of justice."

In *Kaizo* v. *Henry, 211 U. S. 146,* referring to the contention that eight members of the grand jury which indicted the prisoner were disqualified, the effort being to raise that objection by writ of habeas corpus, Mr. Justice Moody said:

"But we find no occasion to decide or consider this question. If the plaintiff in error desired the judgment of this court upon it he should have brought a writ of error to the judgment of the Supreme Court of the Territory which passed upon it in affirming the judgment of conviction in the trial court. He may not lie by, as he did in this case, until the time for the execution of the judgment comes near, and then seek to raise collaterally, by habeas corpus, *questions not affecting the jurisdiction of the court which convicted him,* which were open to him in the original case, and, if properly presented then, could ultimately have come to this court on writ of error. *Unquestionably if the trial court had exceeded its jurisdiction a prisoner held under its judgment might be discharged from custody upon a writ of habeas corpus by another court having the authority to entertain the writ, Ex parte Lange, 18 Wall. 163; Ex parte Siebold, 100 U. S. 371; Ex parte Yarbrough, 110 U. S. 651; Ex parte Wilson, 114 U. S. 417;* * * * But no court may properly release a prisoner under conviction and sentence of another court, *unless for want of jurisdiction of the cause or person,* or for some other matter rendering its proceedings void. * * * Disqualification of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case."

In *Harlan* v. *McGourin*, *218 U. S. 442*, Mr. Justice Day said:

"The learned counsel for the appellants rely upon a number of cases which are said to warrant the court in habeas corpus proceedings in examining the bill of exceptions with a view to determining such matters as are herein presented. But an examination of these cases will show that where collateral attacks have been sustained through the medium of a writ of habeas corpus, *the grounds were such as attacked the validity of the judgments, and the objections sustained were such as rendered the judgment not merely erroneous, but void.* * * * No objection is made to the constitutionality of the statute or the right and authority of the court to consider and determine the guilt or innocence of the accused, and for that purpose to weigh and determine the effect of the testimony offered. The contention is that in the respects pointed out the testimony wholly fails to support the charge. *The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of habeas corpus. Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions.*"

In the recent case of *Stevens* v. *McClaughry*, *207 Fed. Rep. 18*, decided by the Circuit Court of Appeals of the Eighth Circuit, it was held that the proper Federal Court may release by writ of habeas corpus one who is being restrained of his liberty by virtue of a judgment of a Federal Court beyond its jurisdiction, and therefore void, and that one who has been restrained of his liberty for many years by virtue of the judgment of

a court which is beyond its jurisdiction and void, is not barred from a release therefrom by writ of habeas corpus *by the fact that he might have secured sucs relief by a writ of error but failed to apply for it until it was too late.*

The opinion of Judge Sanborn is luminous, and, as we believe, applies to the facts of this case in all of its phases. It is especially valuable for its discussion of the opinion in *Matter of Spencer, 228 U. S. 652,* which is clearly shown not to be applicable to a case like the present. His summary is admirably expressed (*pp. 28 and 29*):

"And here is the true distinction between the cases in which the writ of *habeas corpus* may and those in which it may not issue. If the judgment or sentence challenged is without the jurisdiction of the court and void, the writ may issue. If it is erroneous, but within the jurisdiction of the court which rendered it, the writ may not issue. The parallel between the cases of Snow and Nielsen and the case at bar is complete, and unless the decision in the case of Spencer and others [*228 U. S. 652*] has overruled the cases which have just been reviewed, and departed from the fundamental principles they sustain and the practice under them which has prevailed for years in *In re Mayfield, 141 U. S. 107, 116, 11 Sup. Ct. 939, 35 L. Ed. 635; In re Ladd, C. C. 74 Fed. 31, 42; In re Waite, D. C., 81 Fed. 359, 362, 372; Mackey* v. *Miller, 126 Fed. 161, 163, 62 C. C. A. 139; Ex parte Peeke, D. C., 144 Fed. 1016*—there would seem to be no doubt of the power or duty of the court to issue the writ in the case in hand. We are not persuaded that it has overruled them, departed from the rules they maintain, or decided that every one restrained of his liberty by a void judgment which he might have challenged by writ of error, is barred of relief by means of the writ of

habeas corpus. It has not expressly declared that those decisions are wrong, or that the principles on which they rest are erroneous, and they are too firmly established to be overthrown by silence. On the other hand, it has carefully distinguished the leading case, the Lange Case, from those in which its opinion was delivered, and to hold that one who is being deprived of his liberty for a long term of years by virtue of a sentence beyond the jurisdiction of the court which rendered it has deprived himself of his right to relief by writ of *habeas corpus* because through ignorance, poverty, or neglect he failed to challenge that judgment by writ of error until it was too late is to rob the writ of the very purpose of its existence, the purpose to afford speedy and inexpensive relief from unlawful imprisonment to those otherwise remediless. To us it is incredible that the Supreme Court ever intended to decide, to take the striking illustrations of Mr. Justice Miller in *Ex parte Lange, 18 Wall., at page 176, 21 L. Ed. 872,* that one who should be sentenced by a justice of the peace having jurisdiction to fine for a misdemeanor, or by a court of general jurisdiction, on an indictment for a libel, to imprisonment and death, who through ignorance or neglect should fail to appeal or procure a writ of error within the prescribed time, would be barred of relief by the writ of *habeas corpus.*"

After all, assuming that a constitutional right guaranteed by the Fourteenth Amendment has been infringed, by the action of a state court, in such a manner as to deprive it of jurisdiction to render a judgment which deprives a citizen of his life or his liberty, and relief has been sought in vain in the state court, and the right of review here by writ of error has been prevented, it has not presented a case, to which the pointed language of Mr. Justice Holmes in *Rogers* v. *Alabama, 192 U. S. 226, 230,* is applicable:

"It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights. It is well known that this court will decide for itself whether a contract was made as well as whether the obligation of the contract has been impaired. *Jefferson Branch Bank* v. *Skelly, 1 Black, 436, 443.* But that is merely an illustration of a more general rule. On the same ground there can be no doubt that if full faith and credit were denied to a judgment rendered in another State upon a suggestion of want of jurisdiction, without evidence to warrant the findings, this court would enforce the constitutional requirement. See *German Savings & Loan Society* v. *Dormitzer, 192 U. S. 125.*"

VIII.

The appellant had, before applying for a writ of habeas corpus, exhausted all of his remedies in the State courts, and had ineffectually applied for a writ of error to review their determination. This remedy invoking the Federal Constitution for the protection of his life is, therefore, his last resort, and he conforms in every respect to the practice which this Court has pointed out as controlling in like cases.

We are aware of the decisions of this Court which seek to regulate the issuance of writs of

habeas corpus, in original proceedings here, as well as in the United States District Courts, where the validity of criminal proceedings in a State court is sought to be questioned. The effect of these decisions is that, ordinarily, one applying for the writ of *habeas corpus* to a Federal court, in such a case, must first exhaust his remedies in the State court, and, if a Federal question is involved, by seeking to review the judgment of the State court, in this tribunal by writ of error.

When, however, all of the remedies in the State court, and by writ of error in this Court, have been exhausted, and a right guaranteed by the Federal Constitution has been violated by a State court, to such an extent as to nullify the proceedings of that court and to deprive it of jurisdiction, the sacred writ of *habeas corpus,* preserved even from suspension, except in cases of rebellion or invasion, by Article I, Section 9, paragraph 2, of the Federal Constitution, may still be successfully invoked. This must especially be true, when the right to due process of law derived directly from the Federal Constitution is the basis of the petitioner's contention.

In the enforcement of this right, the exercise of the undoubted jurisdiction of the courts of the United States cannot be made dependent upon the action of the State tribunals, denying the constitutional right asserted or on their refusal to determine it, because of rules of practice adopted or laid down by them. Otherwise they might, in defiance of the Federal judiciary, nullify the Federal Constitution, or neutralize the power of the Federal courts to enforce it, as against its infraction by State agencies, whether executive, legislative or judicial.

While it may well be conceded, from considerations of comity, (*a*) that the Federal courts ought not to issue the writ of *habeas corpus* in advance of trial in the State courts, and (*b*) that after conviction they ought not to issue such a writ, save in exceptional circumstances, until the right of appeal in the State courts has been exhausted, and although it may further be conceded (*c*) that for reasons of convenience, where proceedings in error to review the action of the State courts by this Court are allowed, the writ of *habeas corpus* should not ordinarily issue until the right of review here has been likewise exhausted, yet, where all of these normal modes of procedure have been followed, or where resort to the normal remedies has been denied, or has been lost through misconception, inadvertence, or even ignorance, it would be revolutionary to hold, that a substantive right, grounded on the Federal Constitution, and determinative of the jurisdiction of a State Court, can be disregarded by this Court, simply because the petitioner for a writ of *habeas corpus,* by means of which his constitutional right is sought to be vindicated, might, on some previous occasion, have resorted to another or more usual method for the adjudication of his rights. If no other way is open to him *now,* the door should not be closed upon him because, by the exercise of greater prescience or the possession of an infallible judgment, he might have avoided the necessity of resorting to the Federal courts for relief by means of the writ of *habeas corpus.*

This contention is, we believe, in strict accordance with *Ex parte Royall, 117 U. S. 241,* and the long line of cases which have followed it. It was there expressly held, that the courts of the United

States have jurisdiction on *habeas corpus* to discharge from custody a person who is restrained of his liberty in violation of the Constitution of the United States, but who at the time is held under State process for trial on an indictment charging him with an offense against the laws of the United States. It was, however, declared, out of considerations of comity, that when a person is in custody under process from a State court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, a court of the United States has a discretion whether it will discharge him in advance of his trial in the court in which he is indicted; but this discretion is subordinated to special circumstances requiring immediate action. After the conviction of the accused in the State court, the Federal court has still a discretion whether he shall be put to his writ of error to the highest court of the State, or whether it will proceed by writ of *habeas corpus* summarily to determine whether he is restrained of his liberty in violation of the Constitution of the United States. Although in that case the writ of *habeas corpus* was withheld because the petitioner had not exhausted his other remedies, in concluding his opinion Mr. Justice Harlan said:

"As it does not appear that the Circuit Court might not, in its discretion and consistently with law and justice, have denied the applications for the writ at the time they were made, we are of opinion that the judgment in each case must be affirmed, *but without prejudice to the right of the petitioner* to renew his applications to that court

at some future time should the circumstances render it proper to do so."

In *Ex parte Charles W. Fonda, 117 U. S. 516,* Mr. Chief Justice Waite, said:

"This motion is denied on the authority of *Ex parte Royall.* No reason is suggested why the Supreme Court of the State may not review the judgment of the circuit court of the county, upon the question which is raised as to the application of the statute, under which the conviction has been had, to embezzlements by the servants and clerks of national banks; nor why it should not be permitted to do so without interference by the courts of the United States. *The question appears to be one which, if properly presented by the record, may be reviewed in this court after a decision by the supreme court adverse to the petitioner. The case as made by the motion papers is not one which, under the principles settled in Royall's Case, requires this Court to act in advance of the orderly course of proceeding for a review of the judgment by writ of error.*"

In *Wood v. Brush, 140 U. S. 278,* Mr. Justice Harlan said, in part:

"Whether the appellant might not have availed himself, in other modes, and during the trial, of the objection now under consideration, we need not inquire; for, independently of the view we have expressed, and even if there were some room for a different construction of the New York Code, *the Circuit Court might well have forborne to act until this question had been definitely determined, either in the highest court of New York, or in this court upon a writ of error sued out by the appellant.* While the courts of the United States have power, upon *habeas corpus,* to inquire into the cause of the detention of anyone claiming to be

restrained of his liberty in violation of the Constitution, or laws, or treaties of the United States, it was not intended by Congress that they should by writs of *habeas corpus* obstruct the ordinary administration of the criminal laws of the States, through their own tribunals. 'Where', this court said in *Ex parte Royall, 117 U. S. 241, 252, 253,* 'a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the circuit court has a discretion, whether it will discharge him, upon *habeas corpus,* in advance of his trial in the court in which is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus,* summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States. *And we will add, that after the final disposition of the case by the highest court of the State, the circuit court, in its discretion, may put the party who has been denied a right, privilege or immunity claimed under the Constitution or laws of the United States to his writ of error from this court, rather than interfere by writ of habeas corpus.* These principles have special application where, as in the present case, there is no pretense that the Statute under which the prosecution of the appellant was conducted is repugnant to the Constitution or laws of the United States.''

In *Cook* v. *Hart, 146 U. S. 183,* Mr. Justice Brown said in concluding:

"While the power to issue writs of *habeas corpus* to state courts which are proceding in disregard of rights secured by the Constitution and laws of the United States may exist, the practice of exercising such power before the question has been raised or determined in the state court is one which ought not to be encouraged. The party charged waived no defect of jurisdiction by submitting to a trial of his case upon the merits, and we think that comity demands that the state courts, under whose process he is held, and which are equally with Federal courts charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to in the first instance. *Should such rights be denied, his remedy in the Federal court will remain unimpaired.* So far from there being special circumstances in this case to show that the Federal court ought to interfere, the fact that, with ample opportunity to do so, he did not apply for this writ until after the jury had been sworn and his trial begun in the state court, is of itself a special circumstance to indicate that the Federal court should not interpose at this time."

In *Ex parte Frederich, 149 U. S. 70,* Mr. Justice Jackson said in concluding:

"It is certainly the better practice, in cases of this kind, to put the prisoner to his remedy by writ of error from this court, under section 709 of the Revised Statutes than to award him a writ of *habeas corpus.* For, under proceedings by writ of error, the validity of the judgment against him can be called in question, and the Federal court left in a position to correct the wrong, if any, done the petitioner, and at the same time leave the state authorities in a position to deal with him

thereafter, within the limits of proper authority, instead of discharging him by *habeas corpus* proceedings, and thereby depriving the state of the opportunity of asserting further jurisdiction oven his person in respect to the crime with which he is charged.

In some instances, as in *Re Medley, 134 U. S. 160,* the proceeding by *habeas corpus* has been entertained, although a writ of error could be prosecuted; but the general rule and better practice, in the absence of special facts and circumstances, is to require a prisoner who claims that the judgment of a State court violates his rights under the Constitution or laws of the United States to *seek* a review thereof by writ of error instead of resorting to the writ of *habeas corpus.*

"In the present case we agree with the court below that the petitioner had open to him *the remedy by writ of error from this court* for the correction of whatever injury may have been done to him by the action of the state courts, and that he should have been put to that remedy rather than given the remedy by writ of *habeas corpus.* The circuit court had authority to exercise its discretion in the premises, and we do not see that there was any improper exercise of that discretion, under the facts and circumstances.

"Without passing, therefore, upon the merits of the question as to the constitutionality of the provision of the code under which the supreme court proceeded in disposing of the case, when it was before it, or upon the question of the validity of the judgments rendered by the state courts in the case, we are of opinion, for the reasons stated, that the order of the circuit court refusing the application for the writ of *habeas corpus* was correct, and it is accordingly affirmed."

In *New York* v. *Eno, 155 U. S. 89, 95,* Mr. Justice Harlan said in part as follows:

"This court denied the application upon the authority of *Ex parte Royall,* observing that no reason had been suggested why the supreme court of the state might not review the judgment of the inferior state court upon the question as to the application of the statute under which the conviction was had to embezzlement by the servants and clerks of national banks, nor why it should not be permitted to do so without interference by the courts of the United States; that the question appeared to be one which, *if properly presented by the record, might* be reviewed in this court after a decision by the supreme court of state adverse to the petitioner."

In *Pepke* v. *Cronan, 155 U. S. 100,* Mr. Chief Justice Fuller said:

"It is insisted upon the argument that the judgment in contempt was not appealable (*State* v. *Davis, 2 N. D. 461*) but it was conceded that the validity of the law and the sentence could be contested by the supreme court of the state on *certiorari* or *habeas corpus* and no reason was suggested why, if the judgment of the district court was the final judgment of the highest court of the state in which a decision in the matter could be had, a writ of error from this court might not be applied for.

"Without considering the merits of the questions discussed, the judgment must be affirmed upon the authority above stated."

In *Re Chapman, 156 U. S. 211,* Mr. Chief Justice Fuller said in concluding:

"In the case before us, the question as to the jurisdiction of the Supreme Court of the District

of Columbia has indeed already been passed upon by that court and also by the court of appeals, upon a demurrer to the indictment, but the case has not gone to final judgment in either court, and what the result of a trial may be cannot be assumed. We are impressed with the conviction that the orderly administration of justice will be better subserved by our declining to exercise appellate jurisdiction in the mode desired *until* the conclusion of the procedings. If judgment goes against petitioner and is affirmed by the court of appeals and a writ of error lies, that is the proper and better remedy for any cause of complaint he may have. *If, on the other hand, a writ of error does not lie to this court, and the Supreme Court of the District was absolutely without jurisdiction, the petitioner may then seek his remedy through application for a writ of habeas corpus.* We discover no exceptional circumstances which demand our interposition in advance of adjudication by the courts of the district upon the merits of the case before them."

In *Whitten* v. *Tomlinson, 160 U. S. 231,* Mr. Justice Gray said:

"But, except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by *habeas corpus in advance* of a final determination of his case of the ccurts of the state; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court."

In *Baker* v. *Grice, 169 U. S. 284,* Mr. Justice Peckham said:

"If this application had been made *subsequently* to a trial of the petitioner in the state court and his conviction upon such trial under a holding by that court that the law was constitutional, and

where an appeal from such judgment of conviction merely imposing a fine could not be had, excepting upon the condition of the defendant's imprisonment until the hearing and decision of the appeal, *a different question would be presented* and one which is not decided in this case, and upon which we do not now express any opinion."

In *Tinsley* v. *Anderson, 171 U. S. 101,* Mr. Chief Justice Fuller said:

"The dismissal by the Circuit Court of the United States of its own writ of *habeas corpus* was in accordance with the rule, repeatedly laid down by this court, that the circuit courts of the United States, while they have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint or liberty of any person in custody under the authority of a state in violation of the Constitution, a law or a treaty of the United States, yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person *in advance* of a final determination of his case in the courts of the state, and, even after such final determination, will leave him to his remedy to review it by writ of error from this court."

In *Fitts v. McGhee, 172 U. S. 516,* Mr. Justice Harland said:

"Further, even if the Circuit Court regarded the act of 1895 as repugnant to the Constitution of the United States, the custody of the accused by the state authorities should not have been disturbed by any order of that court, and the accused should have been left to be dealt with by the state court, with the right, after the determination of the case in that court, to prosecute a writ of error from this court for the re-examination of the final judgment so far as it involved

any privileges secured to the accused by the Constitution of the United States."

In *Markuson* v. *Boucher, 175 U. S. 184,* Mr. Justice McKenna, concluding, said:

"The case at bar presents no circumstances to justify a departure from the rule or to relieve from the application of its reasons. *Nor does the question arise what right appellant would have had to petition relief from the District Court if his remedies against the judgment of the state court had ceased to exist.*"

In *Minnesota* v. *Brundage, 180 U. S. 499,* Mr. Justice Harlan, concluding, said:

"Without expressing any opinion as to the validity of the Minnesota statute, the judgment of the Circuit Court must be reversed, with directions to dismiss the application for a writ of *habeas corpus, without prejudice to a renewal* of it when the appellee shall have exhausted the remedies provided by the State for a review of the judgment of the Municipal Court of Minneapolis."

In *Urquhart* v. *Brown, 205 U. S. 179,* the right of the Federal court to determine the jurisdiction of a State court in a criminal case by writ of *habeas corpus* was recognized, Mr. Justice Harlan saying:

"It is the settled doctrine of this court that although the Circuit Courts of the United States, and the several justices and judges thereof, have authority, under existing statutes, to discharge, upon *habeas corpus,* one held in custody by State authority in violation of the Constitution or of any treaty or law of the United States, the court, justice or judge has a discretion *as to the time and*

mode in which the power so conferred shall be exerted; and that in view of the relations existing, under our system of government, between the judicial tribunals of the Union and of the several States, a Federal court or a Federal judge will not ordinarily interfere by *habeas corpus* with the regular course of procedure under State authority, but will leave the applicant for the writ of *habeas corpus* to exhaust the remedies afforded by the State for determining whether he is illegally restrained of his liberty. *After the highest court of the State, competent under the State law to dispose of the matter, has finally acted, the case can be brought to this court for re-examination.* The exceptional cases in which a Federal court or judge may sometimes appropriately interfere by *habeas corpus in advance of final action by the authorities of the State* are those of great urgency that require to be promptly disposed of," etc.

In *Glasgow* v. *Moyer, 225 U. S. 420,* Mr. Justice McKenna said, in part:

"Having remitted him to a writ of error as a remedy, it would be a contradiction of the ruling, *he not having availed himself of the remedy,* to permit him to prosecute *habeas corpus.* The ground of the decision was that there was an orderly procedure prescribed by law for him to pursue; in other words, to set up his defenses of fact and law, whether they attacked the indictment for insufficiency or the validity of the law under which it was found; and, if the decision was against him, test its correctness through the proper appellate tribunals."

There is nothing in *Ex parte Spencer, 228 U. S. 652,* which militates against the appellant's right to maintain these proceedings, or which disturbs the doctrine recognized in the cases above cited, that after the exhaustion of remedies in the State

court and by an effort to review their determination in this Court, the Federal courts will by writ of *habeas corpus* in a proper case, determine a jurisdictional question based upon one of the rights guaranteed by the Federal Constitution. That was an original motion in this Court, for leave to file an application for a writ of *habeas corpus* to investigate the legality of a sentence imposed by the Pennsylvania Court of Quarter Sessions under the Indeterminate Sentence Act. After sentence the petitioner had taken an appeal to the Superior Court of Pennsylvania, where the sentence was affirmed. Subsequently he presented a petition to the Supreme Court of the State praying for an allowance of the right to appeal, but that petition was refused. In neither court was the question of the constitutionality of the Pennsylvania act under which the sentence was imposed, raised, nor was any constitutional question presented. The petitioner subsequently sought, by *habeas corpus* in the State court and in the United States District Court, to litigate the legality of his sentence, but both petitions were refused. It was pointed out that the petitioner had ample opportunity to avail himself of the objections to the validity of his sentence, but failed to do so, and that the circumstances of the case were not of so exceptional a nature as to call for interference by *habeas corpus.*

This Court also held, that where, as in Pennsylvania, the judgment of a trial court in criminal cases is subject to modification, as well as affirmance or reversal, by the appellate court, and a sentence partly legal and illegal under the State law can be modified by striking therefrom the illegal part, such sentence is erroneous and not

void, and that consequently this Court will not on *habeas corpus* pass upon the question of the legality of the part of the sentence complained of, the proper remedy being to review the judgment on appeal.

It was also decided that it was not the duty of this Court to question the decision of the State court as to the effect of one State statute upon an earlier one, or to declare which of two rules, supported by conflicting decisions, the State will apply.

That there was no conflict between this decision and the previous adjudications, is clearly pointed out in *Stevens* v. *McClaughry, 207 Fed. Rep. 18.*

It is to be observed in the present case, that the point on which we rely, the loss of jurisdiction, occurred at the later stages of the trial which culminated in the verdict whose nullity we assert, at a time when the appellant and his counsel were absent from the court, as the result of coercion. He never knew of the circumstances under which the verdict was rendered in his absence, until after he had been sentenced to death and judgment had been pronounced against him. At that time jurisdiction no longer existed. There was nothing that he could have done then, for the protection of his rights of which he had already been deprived. Had he then undertaken to call the attention of the court to the fact that his constitutional rights had been impaired, the situation could not have been altered. The verdict had been received and the jury discharged. He had been condemned without due process of law, and nothing that the court could do, would restore the jurisdiction which it had lost, or impart life to that which was dead. It is likewise true that

there was nothing that he or his counsel could have done to overcome the action of the mob which was subverting the orderly processes of the law. The Court itself confessed its powerlessness, and submitted to mob domination. That invalidated the trial and nothing could thereafter make it valid.

Even assuming that appellant's motion for a new trial might have been predicated upon this deprivation of his rights and the loss of jurisdiction which ensued (although the Supreme Court of Georgia in *Nolan v. State, 53 Ga. 137; 55 Ga. 522,* and in other decisions, had adjudged it not to be the proper remedy,) yet the fact that the point was not raised by that motion or by writ of error to review the denial of the motion for a new trial did not, and could not, confer validity on that which was a nullity.

The appellant, however, attempted to raise the jurisdictional question by a motion to set aside the verdict, and to review it in this Court by writ of error. That opportunity was not vouchsafed to him, because the decision of the Supreme Court of Georgia, was based in part on a non-Federal question. Yet appellant's inability to procure a review here of the decision of the State court did not convert into due process of law that which offended against the constitutional requirements, and therefore should not preclude him from raising the question which he now seeks to present by habeas corpus, namely, whether or not the judgment pronounced against him was void because at the time of its pronouncement the court had lost jurisdiction.

In *Stevens* v. *McClaughry, 207 Fed. Rep. 18,* where the prisoner failed to seek relief by writ of error until it was too late, it was nevertheless held that it was within the power of the court to grant him relief from detention under a void judgment.

So, in the present case, if the prisoner had failed altogether to make a motion for a new trial or to apply for a writ of error until it was too late, the same result would follow. An utter failure to apply for a writ of error until it is too late, does not differ from a failure to raise the question of jurisdiction in the State court in a proceeding in which that objection might have been raised, but was not in fact raised.

Indeed the exhaustion of remedies in the State courts cannot be said to be a jurisdictional condition precedent to the institution of habeas corpus proceedings in the Federal Court. This Court has merely indicated that, in certain cases such procedure is proper and desirable. But the right has always been reserved by it, in cases of importance, to act regardless of the proceedings taken to review the determination of the State courts.

In the present case there was a most strenuous and earnest effort to obtain such review. Counsel acted on the assumption that the rule laid down in *Nolan* v. *State, supra,* was the law of Georgia. It was not until the decision in appellant's case by the Supreme Court of that State, that it had ever been held in that court that the proper remedy in such a case as the present, was not that pointed out in *Nolan* v. *State*—a motion to set aside the verdict—but a motion for a new trial.

The circumstances in the present case are such, that we feel justified in enlarging on the phase of the subject which we are now discussing, not for the purpose of seeking to review the decision of the Supreme Court of Georgia in *Frank* v. *State, 83 S. E. Rep. 645,* as to what the proper procedure in that State is, but to show that the appellant and his counsel had at least ample justification, in the decisions of Georgia, for their omission to raise the fundamental questions which are presented by this proceeding, on the motion for a new trial, and for their conclusion that the proper mode of presenting them was by the motion subsequently made to set aside the verdict.

In *Nolan* v. *State, 53 Ga. 136,* the prisoner, after his first conviction, moved in arrest of judgment, stating as a ground for reversal, that the verdict of the jury had been received in his absence. The Supreme Court decided that such a motion was not the proper remedy, but that a motion to set aside the verdict was. The judgment of conviction was affirmed. After the affirmance, the prisoner moved to set aside the verdict on the ground of its illegality. That motion was granted. A second trial followed, and the judgment then rendered was brought for review to the Supreme Court of Georgia, in *Nolan* v. *State, 55 Ga. 521.* There the propriety of the procedure adopted was recognized.

These decisions, rendered in 1874 and 1875, respectively, were considered by the legal profession in Georgia as firmly establishing the proposition, that a motion to set aside the verdict was in such a case the correct practice.

In November, 1909, the Court of Appeals of Georgia, which has jurisdiction to declare and promulgate the law (*Georgia Laws 1906, p. 24; Georgia Code of 1910, § 6506*), in an opinion by Chief Justice Hill, couched in terms incapable of being misunderstood, in *Lyons* v. *State, 7 Ga. App. 50*, declared the law as follows:

"This is not a motion to set aside a judgment; because there seems to have been no judgment rendered in the case. It is a petition to vacate and set aside a verdict, for an irregularity not appearing on the face of the record, on which a rule was issued and served; and it certainly constituted a proceeding in a court of law having full jurisdiction of the subject-matter alleged in the petition. We know of no other full and adequate remedy for a party deprived of his right as alleged in this petition than the one adopted. The rendition of the verdict during his enforced absence, without a waiver by himself, deprived him of a constitutional right. The error is hardly one that would be proper matter in a motion for a new trial; and if the defendant were compelled to resort to a motion for a new trial to correct such error, he would be prevented from asserting another great constitutional right,—the right not to be again placed in jeopardy for the same offense. Neither his counsel nor himself was present to object to the reception of the verdict. Certainly it could not be expected that he would be required to file a bill in equity, if such a thing could be done, to get rid of this verdict which had been improperly rendered in his absence. The procedure which he adopted was a direct and simple procedure for the assertion of his rights and for the application of the remedy for which he prayed. It was a remedy approved by Chief Justice Warner, speaking for the court, in the case of *Nolan* v. *State, 53 Ga. 138*, as follows: '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.' 'If the defendant is not present when the verdict is rendered, that is a fact extrinsic of the record, and may be shown on a motion to set aside the verdict for that reason.' 'A verdict rendered during the compulsory absence of the defendant is illegal, and will be set aside on motion.' *Barton v. State, 67 Ga. 653 (44 Am. R. 743).* The procedure adopted in this case is in accord with the trend of modern judicial utterance and legislative enactment to do away with all technical niceties of pleading and to present to the court, clearly and simply, the issues involved in the case."

These decisions, and others that followed them, had never been departed from until the announcement of that, printed at pages 22-39 of the present record. The new Georgia procedure was thus for the first time promulgated in the appellant's case, and in a form which conflicted *in toto,* with the prior promulgation by the State Supreme Court of the practice which appellant followed.

The dilemma of appellant's counsel can be best illustrated by what the Supreme Court said on the two occasions when the *Nolan* case came before it, and what it subsequently said in his case:

From the first Nolan case:

"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

From the Frank case:

"This last statement (that a motion to set aside the verdict was the proper remedy), 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

absence, that motion for a new trial, as such should have been granted by the court." motions have been likened to motions in arrest and to set aside."

From the second Nolan case:

"The motion to set aside the verdict in the case at bar was made after the denial of a motion in arrest of judgment: see 53 Georgia Reports, 137; and the state contends that such a motion (motion to set aside) is equivalent to an application for a new trial: 30 Georgia Reports, 191. This is an effort to draw the prisoner into a second jeopardy as the price of escaping from the first. It is hard enough to pay the price where a new trial is actually moved for and granted. We think such a traffic in jeopardies is not to be considered as conducted by implication. The bill of rights declares that '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 a case of mistrial. Code, section 5000."

"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."

It is further to be noted that, while in our case the Supreme Court of Georgia held, that the failure to raise the question, which we are treating as jurisdictional, on a motion for a new trial, operated as an acquiescence in and a waiver of the objection, in *Nolan* v. *State* no motion for a new trial was made, and the motion to set aside the verdict was filed and entertained at a term subsequent to that at which the prisoner had been convicted.

The Code of Georgia in force at the time of the *Nolan* decision (*Georgia Code of 1873, § 3719*) provided:

"3719: *Application to be made during term.* All applications for a new trial, except in extraordinary cases, *must be made during the term at which the trial was had,* but may be heard, determined and returned in vacation."

The Code of Georgia in force at the time of appellant's trial (*Georgia Code of 1910, § 6089*) reads:

"6089. *Application for new trial.* All applications for a new trial, except in extraordinary cases, *must be made during the term at which the trial was had;* and when the term continues longer than thirty days the application shall be filed within thirty days from the trial, together with the brief of evidence, subject to the approval of the judge and subject to the right of amendment allowed in applications for a new trial; and all applications herein provided for may be heard, determined and returned in vacation."

It necessarily follows, that if failure to include the objections on which we now rely in a motion

for a new trial actually filed, rendered them unavailable, then certainly the same consequences should have followed in a case where no motion for a new trial was filed at all.

In the recent decision of the Supreme Court of Georgia in appellant's case, reliance was placed on the decision in *Lampkin* v. *State, 87 Ga. 517* (*Rec. p. 37*). The interpretation given to that latter, was we submit one, which could not have been foreseen by appellant or his counsel. That is indicated by comparing the language of the prior decision with the interpretation given to it in the later opinion:

Seventh headnote in Lampkin case:	*From the Frank case:*
"When facts, and a witness by whom they can be proved, to manifest the incompentency of a juror, come to the knowledge of counsel for the accused, after the jury are sworn but before any further step 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."	"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 to set aside the verdict because of the absence of the defendant at the time it was rendered."

The effect of this unexpected announcement of a new rule of procedure was, to deprive this Court of the right to review the decision of the Supreme Court of Georgia by writ of error, a procedural question being presented which was non-Federal, and, therefore, non-reviewable although the State Court also undertook to decide a question arising under the Federal Constitution.

It would prove a serious reflection upon the law, which would give rise to unfortunate misunderstanding and serious animadversion, if, under these circumstances, a man may be deprived of his life by a judgment void for lack of jurisdiction, simply because counsel resorted to what the court *ex post facto* declared to be the wrong remedy, although in reality they sought to pursue the strict letter of previous adjudications.

IX.

Judge Newman entirely misconceived the decisions which led to a denial of a writ of error to review the judgment of the Supreme Court of Georgia, and misapplied them.

The reason for the denial of a writ of error by this Court, and its several members, was not that a Federal question was not involved in the case, but that the Supreme Court of Georgia put its decision upon two grounds, (1) that the Fourteenth Amendment to the Constitution was not

violated, and (2) that in any event it was too late to raise that question on the motion to set aside the verdict, because it should have been raised on the motion for a new trial, which appellant had made.

If the second of these grounds had been omitted, then, unquestionably, a Federal question would have been involved, namely, whether or not the petitioner had been deprived of due process of law. But inasmuch as the court rested its decision on two grounds, one of them constitutional and the other procedural, and each of the grounds was a sufficient basis for the affirmance by the Supreme Court of Georgia of the judgment of the lower court, this Court held, in accordance with numerous precedents, that under these circumstances a writ of error from this Court would not lie.

> *Waters-Pierce Oil Co.* v. *Texas, 212 U. S. 112.*
> *Allen* v. *Arguimbau, 198 U. S. 149.*
> *Garr, Scott & Co.* v. *Shannon, 223 U. S. 458.*

Our hope was, to satisfy the Court that the two grounds stated were not independent of one another, but interdependent, and that the decision of the Supreme Court of Georgia amounted, in substance, to a determination, that the failure to raise the objection based on the absence of the petitioner at the time of the rendition of the verdict, was in effect a determination that, by his non-action or acquiescence, he had waived a constitutional right which, it had been held by this Court, could not be waived expressly. It is evident, however, that the view prevailed here, that