

FRANK LOSES FIGHT TO ANNUL VERDICT

**State Defeats Motion Based on
Plea That Prisoner Was Ab-
sent When Jury Reported.**

GOES TO SUPREME COURT

**Atlanta Case Will Be Represented
on Two Appeals Before Geor-
gia's Highest Tribunal.**

Special to The New York Times.

ATLANTA, Ga., June 6.—Leo M. Frank suffered another court defeat today when Judge Hill sustained the State's demurrer to his motion to set aside the verdict rendered at his trial last August on the charge of murdering Mary Phagan. The motion to set aside the verdict was based on the fact that Frank was not in court when the jury reported its decision. His attorneys had waived his presence, and it was at their request Frank was taken from the court room just before the verdict was announced.

Judge Hill, in sustaining the demurrer filed by Solicitor Dorsey, said there was so much that was conflicting in the decisions on this point of law that he had determined to send the case on up to the Supreme Court so that the high tribunal might decide finally just what the law of Georgia was. John Tye and Henry Peeples, counsel for Frank, announced that they would prepare a bill of exceptions at once to be transmitted to the Supreme Court. Judge Hill will leave here for a brief trip to Florida on Saturday night, and will sign the bill on his return.

A supersedeas order was signed by Judge Hill staying the execution of Frank pending the ruling on the motion by the Supreme Court. Another supersedeas already is in effect as a result of the extraordinary motion for a new trial yet to be reviewed by the Supreme Court.

Ruling of the Court.

The Court sustained the State's demurrer on all grounds, both general and special, at the close of Mr. Peeples's argument, and without hearing from Solicitor Dorsey in rebuttal. Mr. Peeples cited a celebrated Georgia case known as the Lyons case, and the Court referred to it in his ruling.

"I am prepared to say," Judge Hill remarked, "that the arguments put forth by the attorneys in the case were extremely able and voluminous. My mind is clear as to my judgment in the matter. The true rule should be as in the Lyons case. I think that the attorneys for the prisoner adopted the right rule of practice.

"But Mr. Dorsey cited a good many decisions which appear to be in direct conflict with the principles laid down in the Lyons case and which appear to be in conflict with themselves. For this reason I think it proper for me to give the matter to the Supreme Court to harmonize."

The Lyons decision, written by Judge Hill when he was a member of the Court of Appeals, set forth that a defendant in a felony and misdemeanor case had the right to be present in court at every stage of his trial, and that his attorneys had not the right, except on their client's express authority, to waive his presence.

The order sustaining the demurrer follows:

Upon considering the above and foregoing demurrer and after argument the same is hereby sustained on each and every ground and the motion to set aside the verdict in the case of the said Leo M. Frank is dismissed. BEN. S. HILL,
Judge of the Superior Court.

The appeal on the extraordinary motion for a new trial already has been signed by Judge Hill and will be filed with the Supreme Court on Monday.

The bill of exception on the sustaining of the demurrer in the motion to set aside probably will be signed the week of June 15.

Should the Supreme Court of Georgia overrule Judge Hill in his action in sustaining the demurrer, the motion would come back to the Superior Court for argument. A reversal by the Supreme Court would be regarded as the equivalent of an affirmation of the principle set out in Judge Hill's opinion in the Lyon's case and the argument on the motion would centre about the question of facts in Frank's case.

It generally is believed by those familiar with Supreme Court procedure that neither of the motions will receive final adjudication before late Fall. The Supreme Court will adjourn during the Summer and it is not thought likely that they will take up either of the motions before the October term.

Make Exhaustive Argument.

Going back to virtually every important decision in the history of the Georgia and the United States Supreme Courts in his endeavor to establish that Frank was deprived of an essential right at his trial last August, Mr. Peeples made a remarkable exposition of the principles of law on the point at issue. He had at hand practically every controlling decision made in the United States. Judge Hill indicated a doubt as to the propriety of the motion at this time, and Mr. Peeples brought forward numerous authorities to support his course.

He then referred to a decision by Justice Harlan which held that a prisoner himself could not waive his presence at any period of the trial. In another United States case it was held that in felonies it was not in the power of the prisoner, either himself or by his counsel, to waive his presence at any stage of the trial.

Judge Hill inquired at this point if it were not true that the whole aspect of the court plea had been altered from the fact that Frank, having full knowledge that his remedy was at hand—the remedy of having the verdict set aside because of his absence at its reception—had ignored this remedy and adopted another by filing the motion for a new trial and pressing it through the courts to a final adjudication by the Supreme Court.

Attorney Peeples replied that he did not understand that there was any law or practice which contemplated the estoppel of a motion to set aside because another remedy had been tried first and found efficacious.

"I have reviewed to your Honor the cases which I believe fixed the law in this State and the United States," said Mr. Peeples. "I have cited cases which have been decided in our neighboring States. I have yet to find a case which warrants the Solicitor in his contention that the attorneys for the prisoner have the right to waive his presence, and only one—the Cawthorne case—which presumes to say explicitly that the prisoner himself has the right."

Messrs. Tye and Peeples both held that a vital and fundamental right was taken from Frank when he was kept in his cell and the verdict received in his absence. Mr. Tye asserted that the polling of the jury was not a simple formality that could be conducted as legally and properly in the prisoner's absence as in his presence. He contended that it was the inalienable right of a prisoner to stand face to face with each of the jurors and receive from each of them the avowal of the verdict.