FRANK'S LAST HOPE IN GEORGIA GONE

State Supreme Court Rules Against His Motion to Set Aside Murder Verdict.

HOLDS HIS PLEA TOO LATE

Should Have Demanded Constitutional Rights When Moving for New Trial.

NOW TO MAKE FINAL APPEAL

Case Will Be Carried to United States Supreme Court on Writ of Error or Habeas Corpus.

Special to The New York Times.

ATLANTA, Ga., Nov. 14.—Leo M. Frank's fight for life, so far as the courts of Georgia are concerned, is over. The supreme tribunal of the State today upheld Solicitor General Dorsey's demurrer to the motion to set aside the verdict declaring Frank guilty of the murder of Mary Phagan. An appeal to the Supreme Court of the United States is now all that stands between the prisoner and death except the invoking of Executive clemency.

The motion to set aside the verdict was made on the ground that the prisoner's constitutional rights were invaded by his absence from the courtroom when the jury returned the verdict of guilty. The decision was written by Justice Warner Hill and was concurred in by the entire court, with the exception of Justice Fish, who is ill.

Frank, in his cell in the Tower, received the news with the same equanimity that has marked his demeanor since his arrest.

"I had put great faith in the plea of my lawyers," he said, "and had looked for a favorable decision by the Supreme Court. That is all I have to say."

Milton Klein, a friend, who was with the prisoner, said: "The United States Supreme Court is next on the list."

Frank was writing a letter when the news was told to him. He was not sufficiently disturbed to stop his work, and in a few minutes completed the letter and gave it to his friend to be mailed.

The State Supreme Court decision goes into the merits of the contentions of the defense in detail. The court holds that the points made by Frank in his motion to set aside should have been made in his motion for a new trial. The court quoted a number of authorities in this connection, after which it said:

> Where a motion for a new trial is made, the defendant must 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 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 versus The State, 141 Georgia, 243,) 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, defendant could have made the question under consideration in the motion for a new trial.

Can't Appeal in Sections.

The court, in substantiation of the principle laid down, cites the case of Daniels vs. Towers, 779 Georgia, 785. Justice Bleckley delivered this opinion, in part, as follows:

> "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 (the Supreme) Court, it is to be taken for all purposes that it was a legal trial and judgment and cannot 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 opportunity to bring it up. He must abide by 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. 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."

Referring to Frank's contention that he had a right to be present when the verdict was rendered and could not waive such right, the court says:

> "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 entered in his case."

Authorities to sustain this point are cited by the court.

Touching upon the authority of Frank's counsel to waive his presence for him, the court says:

Not Deemed Sound Practice.

> As said by this court, in effect, in the case of Lumpkin vs. The State, 87 Georgia, 517, 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 a 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.
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> 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 attorneys for 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.
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> It would be trifling with the court to allow one who had been convicted of crime and who had made a motion for a new trial on over 100 grounds, including a statement that his counsel had waived his presence at the reception of the verdict, 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.
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> 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 use of some of his points to attack 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.
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> Referring to that part of the motion to set aside the verdict on the grounds of disorder in the courtroom during the trial, of cheering and applause outside the courtroom, and of the oral remarks of the trial judge before signing the order denying the new trial, the decision holds that these questions were raised and adjudicated in the motion for a new trial, and that therefore the court will not again consider them.

Will File Writ of Error.

When asked as to the course of action now to be resorted to, John L. Tye of Tye, Peeples & Jordan, attorneys for Frank, said that a writ of error would be filed with the State Supreme Court as soon as possible. This could not be filed before ten days, he said, as it would take that long for the remittur to come from the State Supreme Court to the Superior Court.

When the writ of error is filed it must be certified by the State Supreme Court before the case can be carried to the United States Supreme Court. It is an open question whether the State Supreme Court will certify this writ. If the court refuses, the next resource of the defense, it is said, will be to swear out a writ of habeas corpus in the United States District Court and on this writ take the case to the United States Supreme Court.

Mr. Tye said the case would be carried to the United States Supreme Court on the same grounds as those on which the motion was based to set aside the verdict that Frank was not tried according to due process of law, granted to him as a constitutional right, in that he was not present when the verdict was returned, and for other and minor reasons.

The success of Solicitor General Dorsey's demurrer in the hearing before Judge Ben Hill had the effect of bringing the question of the validity of the demurrer, rather than the merits of the motion itself, before the Supreme Court, and it was upon the demurrer that the court made its decision today.

Solicitor Dorsey's demurrer set up six grounds on which he asked that the Supreme Court dismiss the motion without a hearing by the lower court. His first contention was that the motion should be dismissed "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 the record, and the motion filed is not one so predicated."

The second ground set up by the Solicitor was that Frank, if he wished to take advantage of the fact that he was not in the courtroom at the time of the verdict, should have included this point in the motion for a new trial, which he filed shortly after his conviction.

Frank's Conduct an Estoppel.

The other grounds embodied a similarity of contention, all holding that Frank's conduct had amounted to an estoppel—that is, that he had too late adopted the remedy which might have been proper at an earlier time, but was not now, after he unsuccessfully had fought other motions through the lower court and the Supreme Court. The final ground said:

> "The motion should be dismissed because this petition affirmatively shows that said Frank, after a knowledge of the waiver of his presence 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."

Frank's lawyers, disputing Dorsey's contentions, maintained that the doctrine of estoppel does not exist in criminal cases and that a man on trial for his life has the right at any time to assert for his protection any right given to him by the law.

After disposing of the question of timeliness and practice counsel for the prisoner arrayed hundreds of citations to prove their contention that not one decision in a State court or in the United States Supreme Court ever had held that a defendant's counsel, without the consent of the accused, had the right to waive his client's presence, and that only one decision—the one in the Cawthorn case—held that the prisoner himself had this right in a felony case.

That the attorneys for Frank had built great hopes on the Supreme Court decision, and that it was a distinct shock to them, was stated by Leonard Haas, associate counsel for the convicted man in his plea for constitutional rights.

> "We did not believe that the Supreme Court would deny the motion," Mr. Haas said. "We were confident that Frank would be released by the court's decision. We have not given up hope, however. The United States Supreme Court has many precedents to govern it, in all of which it has ruled that a prisoner cannot waive his presence at the time of the verdict."
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> "I will fight the case if it is taken to the United States Supreme Court," said Solicitor General Dorsey. "The fight has become one against the courts and their decisions, and I shall see it through."

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