FRANK'S LAST STAND IN GEORGIA COURTS

Arguments Heard to Set Aside Verdict Because Rendered in Defendant's Absence.

NUMEROUS DECISIONS CITED

All but One Favorable to Frank's Contention—Case May Go to the United States Supreme Court.

Special to The New York Times.

ATLANTA, Ga., Oct. 26.—When Attorney Henry Peeples concluded his hour's argument today before the Supreme Court of Georgia another fight in the long struggle for Leo M. Frank's life and freedom had been ended, and all recourse was gone, in the event of an unfavorable decision, except the Supreme Court of the United States and the clemency of the Governor of the State.

Four lawyers, among the best in the State, took part in the arguments. Solicitor General Dorsey and Attorney General Grice insisted that to Frank had been given every right necessary to the proper administration of justice, and that he should pay the penalty for the slaying of Mary Phagan, of which he was convicted on Aug. 25, 1913.

John Tye and Henry Peeples marshalled citations from pronouncements of the United States Supreme Court and State Supreme Courts, as well as from the common law, to demonstrate that Frank had been deprived of a substantial and vital right in not being present in the courtroom when the verdict of conviction was returned.

The hearing came to an end so quietly and so quickly that the small audience in the courtroom was taken by surprise. Not until Attorney Peeples thanked the court for its attention and began gathering up his papers, preparatory to leaving, did the spectators realize that it was all over.

Sitting with Chief Justice Fish were Associate Justices S. C. Atkinson and H. W. Hill.

Cawthorn Decision an Exception.

Attorney Peeples declared that an unbroken chain of decisions by the Supreme Court of the United States, the Supreme Courts of the various States, and the court before whom he was making his argument established that a prisoner's counsel in a capital case could not waive his client's presence, and that another decision, one exception to accept by the Cawthorn decision, declared the prisoner himself could not waive this right.

"The Cawthorne case is the only one in a long series of decisions which takes such a stand," Mr. Peeples asserted. "And these decisions, as much as fifteen parts from the rulings made in numberless other cases, says expressly that an attorney can waive his client's presence, without implied authority, only in the event that his client is in the courtroom and makes no sign of repudiating the attorney's action.

"The Frank case was much different. The defendant was not in the courtroom when his attorneys waived his presence. He was incarcerated in the Tower and knew nothing of what was taking place. He had no opportunity either to acquiesce in or to repudiate the action of his counsel.

"This is not a merely technical right of which the prisoner has been deprived. It is the most substantial right that a man on trial for his life can have. This court has held over and over again a prisoner deprived of the right of being present at the selection of the jury, at the charge of the Judge and through the other stages of his trial is deprived of a substantial right. How much greater is his deprivation when he is kept away from court when the jury brings in its verdict and he cannot meet the jurymen face to face as they are being polled."

Both of Frank's attorneys laid stress on the hostility shown toward Frank and on the possibilities of violence as the trial drew near its close. They dwelt on this in explanation of Judge Roan's action in calling Frank's attorneys to him and suggesting that they waive their client's presence for the sake of the prisoner's safety, and that they also were in danger and therefore should not be in court at the rendition of the verdict.

Attorney General Grice spoke less than fifteen minutes. He declared that Frank's absence was a mere irregularity, that no harm had been done, and that Frank could have done nothing more than was done had he been there. He conceded the right of the prisoner to be in the courtroom if he wished, but declared that no substantial right had been violated by his absence.

Declares Frank Acquiesced.

Solicitor Dorsey made much of the Cawthorn decision, written by Justice Cobb of the Georgia Supreme Court, in which it was held that even if an attorney, by reason of his relationship to his client, who is charged with a felony, has no implied authority to waive his client's presence, if the attorney makes the waiver in the presence of the client, who does not at the time repudiate the waiver, the verdict afterward in the defendant's absence will not be held to be invalid.

The solicitor asserted that the Cawthorn case was on all fours with that of the defendant Frank. In the Cawthorn case the attorney for the defense made the waiver in the presence of his client, who did not repudiate the action at that time, but later sought to have the verdict vacated because of his absence. The solicitor argued that, while Frank may not have been physically present in court when waiver was made by his counsel, the situation was the same as in the Cawthorn case, since Frank must have known of the waiver within a brief time of the rendition of the verdict and yet did not repudiate the action of his counsel or raise the point of his absence, even when filing motion for new trial or when appealing from the decision to the State Supreme Court.

"Frank sat by just as much as Cawthorn did," said the solicitor. "He necessarily must have known what was going on, and yet he said nothing. He acquiesced. The State claims, your Honor, that the prisoner by the effect of this decision is stopped from raising the point at this time."

Judge Cobb, in writing the opinion on which the Solicitor largely based his argument, said that it was an open question in this State whether counsel could make the waiver for the client; that the weight of authority in other jurisdictions was that he could not waive the right; that the decisions seemed to draw no distinction between a waiver made in the presence of his client and one made in his absence, but that he saw no reason why the accused should not be bound by an express waiver made in his presence by his counsel, and that the accused should not be allowed to impeach the authority of his counsel when he acts in his presence, unless he promptly repudiates the unauthorized act before the court bases action upon it. Speaking for himself, Judge Cobb stated that he was of the opinion that right to make such a waiver resided in counsel, whether the accused be present or not, his authority being implied by reason of the mere relationship of client and attorney.

"Every presumption is that Frank knew his presence was being waived," Solicitor Dorsey asserted, "and he ought on principle to be estopped from making this motion at this time."

Solicitor Dorsey bore the burden of the argument for the State and spoke for about an hour and a half, reviewing decisions on the point raised in analytical fashion.

Attacks Dorsey's Contention.

Attorney Tye, after detailing instances of disorder and hostile feeling in the court room and street crowds particularly during the later days of the Frank trial, began an attack on Solicitor Dorsey's contention that the motion to set aside the verdict was not predicated upon any defect appearing in fact of the pleadings or the record and, therefore, should be dismissed by the Supreme Court. The lawyer cited a number of cases, among them the famous Fannin versus Durdin case, to demonstrate that the Solicitor was in error on this point, and declared that the long series of decisions from the time of the common law formed an unanswerable and invincible precedent. The right to attack a void judgment was never lost, he declared.

Answering the Solicitor's argument that this ground—Frank's absence at the rendition of the verdict—should have been incorporated in the motion for a new trial, Mr. Tye declared that the established practice of the State forbade that this should be done, and that it was not the proper subject matter for a motion for a new trial.

"If the motion to set aside is sustained," said Mr. Tye, "the man goes free, but if a motion for a new trial were granted, the effect would be only to give the defendant a new trial. The remedies are different and have different effects. The point, therefore, that Frank was absent at the rendition of the verdict could not have been raised properly in the motion for a new trial. The motion to set aside is extrinsic of the record and is not based thereon.

"There is no such thing as estoppel in a criminal case," the lawyer insisted. Quoting from a decision by Judge Ben Hill when, on the Court of Appeals bench, he said that the error (reception of verdict in the defendant's absence) "is hardly one that would be proper matter in a motion for a new trial, for, 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."

An important Federal decision cited was that of Hopt versus The People, in which it was said: "We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the assumption that he alone is concerned as to the mode by which he may be deprived of his life or liberty and that the chief object of the prosecution is to punish him for the crime charged.

"But this is a mistaken view, as well of the relations which accused holds to the public as of the end of the human punishment. The natural life, says Blackstone, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure when on trial and in custody to object to unauthorized methods.

Public Rights Involved.

"The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. Such being the relation which the citizen holds to the public and the object of punishment for public wrongs, the Legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. He may be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

The decision in the case of Barton versus the State, in the Sixty-seventh Georgia, which rules directly on circumstances analogous to those in the Frank case, also was quoted by Mr. Tye. It reads:

"It is the right of the defendant in cases of felony, and this is one, to be present at all stages of the trial, especially at the rendition of the verdict, and if he be in such custody and confinement by the court as not to be present unless sent for and relieved by the court, the reception of the verdict during such compulsory absence is so illegal as to necessitate the setting it aside on a motion therefor. The principle thus ruled is good sense and sound law, because it would be useless for him to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into the court by its order."

"We contend," said Mr. Tye, in conclusion, "that the defendant was forced to be absent at the most critical point of the whole trial. He was deprived of his Constitutional right to poll the jury and to stand before them face to face.

"Can that be due process of law? Can that be the equal protection by the law to all its defendant? Can it be said that under these circumstances the defendant has been granted the rights to which he was entitled?"

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