SAYS FRANK VERDICT WAS LEGAL NULLITY

Should Be Set Aside, Louis Marshall Contends, in Brief Filed with Supreme Court.

PRESENCE OF FRANK VITAL

His Absence at Verdict Violated Due Process of Law—Did Not and Could Not Waive Rights.

Special to The New York Times.

WASHINGTON, Dec. 1.—The Supreme Court of the United States has received the brief prepared by Louis Marshall of New York in behalf of the request presented yesterday by Henry A. Alexander of Atlanta for leave to file a petition for a writ of error in the case of Leo M. Frank, who has been sentenced to death in Georgia for the murder of a factory girl in 1913. This brief, which is signed by Mr. Marshall, Mr. Alexander, and Henry C. Peeples, counsel for Frank, was delayed in the mails until too late for presentation to the court yesterday, when Mr. Alexander in person asked for leave to file a petition.

Mr. Marshall's brief goes further than that filed yesterday in asserting that danger to the court and counsel from a hostile mob at the time of Frank's conviction prevented him from receiving the protection of due process of law. Not only was Frank himself absent, in jail, on the suggestion of the presiding Judge that his presence might subject him to rough treatment if the verdict should be in his favor, but the two lawyers then of his counsel were also absent, and for the same reason. They had been told by the presiding Judge, says the brief, that they, as well as the prisoner, would be in danger of violence if they should be in the courtroom when a verdict of "Not guilty" was rendered.

The brief reads in part as follows:

Denial of Due Process of Law.

Frank was tried in the Superior Court of Fulton County, Ga., on an indictment for murder, before Judge Roan and a jury. A verdict of guilty was rendered by the jury on Aug. 25, 1913, in the absence of the accused. A motion was hereafter made for a new trial before the trial Judge. He denied the motion, saying that "the jury had found the defendant guilty; that he had thought about the case more than any other that he had ever tried; that he was not certain of the defendant's guilt; that, with all the thought he had put on the case, he was not thoroughly convinced that Frank was guilty or innocent, but that he did not have to be convinced; that there was no room to doubt that the jury was; that he felt it his duty to order that the motion for a new trial be overruled."

The case was then taken by writ of error to the Supreme Court of Georgia, where the judgment was affirmed. Thereupon a motion was made on behalf of Frank to set aside the verdict that had been rendered in his absence, on the ground that the reception of the verdict in his absence tended to deprive him of his life and liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States, and that he had not been accorded a fair and impartial trial and was thus denied due process of law.

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

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

His absence was due to the following fact: Shortly before the Hon. L. S. Roan, the Judge who presided upon the trial, began his charge to the jury he privately conversed with L. Z. Rosser and Reuben R. Arnold, two of Frank's counsel, in the jury room of the Court House, and referred to the probable danger of violence that Frank would incur if he were present when the verdict was rendered and the verdict should be one of acquittal. After he had thus expressed himself, he requested counsel to agree that Frank need not be present at the time when the verdict was rendered and the jury polled. Unler these circumstances the counsel agreed with the Judge that Frank should not be present at the rendition of the verdict. In the same conversation the Judge expressed his opinion to counsel that even they might be in danger of violence should they be present at the reception of the verdict. For that reason they agreed with the Judge that they would not be present at the rendition of the verdict.

Without Frank's Knowledge.

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

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

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

POINTS.

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

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

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

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

The decisions in Georgia bearing upon this subject are clear and outspoken, and with one accord they recognize the applicability of this principle to circumstances precisely like those detailed in the present record. There is thus an unbroken line of authority in Georgia, which announces in unqualified terms the rule making the presence of a defendant charged with a felony, at the time of the rendition of a verdict against him, where he is in the custody of the court at the time of the trial, a prerequisite to a legal trial. In other words, if he is not present during every stage of the trial, and especially at its culmination, the reception of the verdict, there has been no trial, whatever jurisdiction the court previously had is lost and, therefore, the judgment of conviction is without due process of the law in the constitutional sense of the term.

Quotes Harlan and Van Devanter.

This is clearly recognized by the decisions of this court, arising under conditions identical in character with those existing here. Thus, in Hopt vs. Utah, 110 U. S., 574, it was held that the trial of challenges to proposed jurors in felony cases, by triers appointed by the court, must be had in the presence, as well of the court, of the accused, and that such presence of the accused cannot be dispensed with. Mr. Justice Harlan said:

> "The prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors. The necessities of the defense may not be met by the presence of his counsel only. For every purpose, therfore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of empaneling the jury begins."

And we may add that necessarily that right to be present only ends when the verdict of the jury has been rendered.

After citing other cases, the brief continues:

In Diaz vs. U. S., 223 U. S., 442, 455, speaking of the necessity for the presence of a defendant on trial for felony, who is not at large on bail, at every stage of the trial, Mr. Justice Van Devanter said:

> "In cases of felony our courts, with substantial accord, have regarded it as extending to every stage of the trial, inclusive of the impanelling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself. And with like accord they have regarded an accused who is in custody and one who is charged with capital offense as incapable of waiving the right; the one, because his presence or absence is not within his own control, and the other because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to apprehension of the awful penalty that would follow conviction."

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

However much the courts have refrained from attempting a definition of due process, it has been settled as a finality that in so far as it relates to legal procedure which may affect life, liberty, or property, it depends on two component elements: 1, notice of the proceedings, and, 2, the right to a hearing, or an opportunity to be heard by the person proceeded against. This right to be heard, or this opportunity to be heard, is not limited to any particular phase of the proceedings. It is coextensive with the entire proceeding, from its beginning to its termination. Thus, a party would be deprived of due process were he merely permitted to interpose an answer and subsequently prohibited from participating in the trial in the issues, or of being present at the time of the rendition of the judgment.

Opportunity to be Heard.

As was said by Webster in the Dartmouth College case, when speaking of the law of the land, it "proceeds upon inquiry and renders judgment only after trial." If, therefore, a person brought into court, especially in a criminal proceeding, is not permitted to be present at the rendition of the verdict, which is in reality the culmination of the entire proceedings, and without which a trial is unthinkable, he has not had that hearing or opportunity to be heard which is a prerequisite to due process of law. The fact that he is in the custody of the court and his presence or absence is subject to the action and control of the court renders his absence the necessary result of judicial action or non-action, by which he is deprived of that opportunity to be heard which is his of right.

It is immaterial at what stage of a litigation the right to be heard or the opportunity to be heard is withheld. So long as it is actualy interfered with by the direct or indirect action of the court, there is a withholding of due process. This being the rule with respect to civil actions, the strict enforcement of it in a criminal proceeding is superlatively important.

In a criminal case, where the prisoner is not required to become a witness, where he is, however, in evidence from the beginning to the end of the trial, where a jury may be influenced, even at the very last moment, by his demeanor and conduct, his equanimity or excitement, the fact of his mere presence constitutes a potent factor in the hearing or opportunity to be heard to which he is entitled under the Constitution.

In other words, for all practical purposes the hearing or opportunity to be heard to which a defendant, especially in a capital case, is entitled, continues down to the very moment when the verdict is actually rendered. The prisoner's opportunity to be looked at by the jury is in such a case for all practical purposes an opportunity to be heard and may prove the equivalent of a most effective hearing. The human element continues to operate. The eyes of the jury are as valuable a means of receiving an impression as their ears. One accused of crime is engaged in testifying to his guilt or innocence to an intelligent observer during every moment of his trial, even though he remains silent.

"Face to Face with Jury."

Emphasis is also laid in various of the authorities on the fact that "at the rendition of the verdict, the prisoner is entitled to have the jury polled, so that each one shall answer on his own responsibility, face to face with the prisoner, as to his guilt or innocence."

The importance of observing the demeanor of the accused by the jury is well illustrated in Rhodes vs. State, 128 Ind., 189 S. C. 27, N. E. Rep. 866, where a new trial was granted to a convicted defendant upon proof that the eyesight of one of the jurors was so defective that he was unable to distinguish one from another of the faces of the witnesses.

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

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

It is to be remembered that Frank was not at large on bail. He could not come and go as he pleased. Nor were the circumstances such as existed in Diaz vs. U. S., (supra,) or in Barton vs. State, (supra,) but as already shown, Frank was not a free moral agent. He could not act upon his own initiative with respect to his attendance upon his trial. He could not even enter the courtroom except on the initiative and at the instance of the court. Without the exercise of its volition his entire trial might have proceeded in absentia. His absence was therefore the direct result of judicial action. In fact, it was because of the positive request of Judge Roan that Frank's counsel, without authority, waived his presence at the reception of the verdict. Had they upon like request waived his presence during the entire trial the situation would have been precisely the same.

Orderly Processes Lacking.

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

If a criminal trial is so conducted that the court and jury are intimidated by manifestations of extreme hostility to the prisoner on the part of bystanders, by the extraordinary presence in the courtroom in conference with the Judge of the Chief of Police of the city in which the trial is in progress and of a Colonel of the State militia, when the air is filled with violent outcries and the prosecuting officer is on every appearance greeted with applause in the hearing of the court and jury, and these physical manifestations are followed by the admonition of the court to the prisoner's counsel that neither he nor they should be in court at the time of the rendition of the verdict lest their very lives be forfeited at the hands of an excited mob, how can it be said that he enjoyed that due process of law which the Constitution of the United States guaranteed to him? He certainly is not "proceeded against under the orderly processes of law" to which Mr. Justice Day referred in Ong Chang Wing v. United States, 218 U. S., 280. A fair trial is in all of the decisions declared to be one of the conditions without which due process of law cannot exist.

Could Not Waive Vital Right.

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

It is admitted by the demurrer as a fact that Frank did not know that his counsel were requested by the court to waive his presence at the time of the rendition of the verdict, or that they had in fact agreed that he should not be present, and that he did not in fact learn of this arrangegment until after the verdict had been rendered, the jury discharged, and the sentence of death pronounced upon him. It is also admitted that he did not authorize his attorneys or any other person to waive his appearance at the time of the rendition of the verdict or to waive their own presence at the time, and that he did not know until he had been sentenced to death that the verdict convicting him of murder had been rendered in the absence of his counsel and that they were not present when the jury was polled by the court. It is not even intimated in the record that it was agreed on his behalf that the jury should be polled. The statement to that effect in the opinion of the Supreme Court of Georgia is unwarranted.

The question therefore arises whether the attempted waiver of his presence by Frank's counsel is for any purpose effective, when he was not voluntarily absent, when he was not at large on bail, but was in the actual custody of the court, and when there is no pretense that he personally waived the right to be present or authorized his counsel to make such waiver. We contend not only that, under the circumstances of this case, there was no waiver, but also that there could be none.

Here, again, the decisions of Georgia speak in the most conclusive terms.

No Waiver by Implication.

4. 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 3 (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 rights 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.

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

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

Decided Objection was Waived.

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

It is not pretended that any question as to the nullity of the verdict was presented or determined on the motion for a new trial. There is nothing in the motion, to which a demurrer had been interposed, which suggests such an idea. The court, however, in passing on the soundness of the demurrer, took judicial notice of the record before it on the review of the motion for a new trial, and referred t a recital of fact contained in the seventy-fifth ground of motion for a new trial. That ground has been certified here by the Clerk of the Supreme Court of Georgia. It merely relates to the proposition that the trial was not a fair and impartial one. It recounts various episodes attending the trial, and incidentally states that the prisoner was not present at the rendition of the verdict, his counsel having waived his presence. It requires no argument to indicate that this was not the presentation of the constitutional question now under consideration and that the court did not and could not have passed upon it on the motion for a new trial.

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

It may well be claimed, in view of the history of Georgia procedure, that this decision is the equivalent of a new law, for the first time adopted, regulating the remedy in a case of constitutional infraction resulting in the nullity of a verdict. Were the decision regarded as holding that a motion for a new trial is the only remedy on which to seek relief in such a case, (which, we have just argued, it has not held,) it would be the first announcement of such a rule by that court. The most that can be said is that heretofore similar questions have been raised on motions for a new trial without objection. But hitherto every adjudged case has been to the effect that a motion to set aside the verdict is a proper remedy, and in Nolan vs. State, supra, and Lyons vs. State, supra, it was decided that it was *the* proper remedy. Frank relied upon this unbroken line of precedents, the soundness of which had never been questioned, and had always been recognized. Rawlins vs. Mitchell, 127 Ga., 24.

Case of Ex Post Facto Law.

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 9, of the Constitution, which prohibits the passing of an ex post facto law.

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

9. Other authorities bearing on the question of jurisdiction are given.

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

Can there be a serious question as to the fundamental merit of our contention that Frank has been deprived of due process of law? If not, this court should be astute in heeding the call of the Constitution. To do otherwise, in the present case, not only means the death of this unfortunate man, the victim of a horrible mistake, but the undermining of the effectiveness as well of the Federal Constitution as an instrument for the preservation of life and liberty and the safeguarding of one accused of crime against the consequences of an inflamed public mind.

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

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

AS PRESS SEES FRANK CASE.

Additional Comment Provoked by Justice Holmes's Statement.

THE TIMES herewith presents additional editorial comment on the Frank case:

Criticism of Justice Holmes.

From The Indianapolis News.

Frank may be guilty and merit the sentence passed upon him. But all this judicial opinion that his case has evoked has not been concerned at all with that aspect of it. It has been confined to consideration of a technical detail. It has been ruling not that Frank was fairly or unfairly tried, not on the essentials of the case, and not even upon the merits of the motion to set aside the verdict. It has been weightily determining whether the motion was made in time or not. It has been reviewing in actual fact not Frank's case, but the procedure of Frank's attorneys.

Justice Holmes doubts—"seriously" doubts—the fairness of Frank's trial, but, notwithstanding, he decides to let the verdict stand. Frank may be innocent, in other words, but because of somebody's blunder he will have to die. How can the lay mind be expected to see justice in a ruling of that sort? It may be entirely legal, but it hardly seems sensible.

Lynching by Public Authority.

From The Milwaukee Sentinel.

If Justice Holmes is right, to hang Frank without a new trial and a fair one would amount to a lynching by public authority. The State of Georgia should weigh well the words of Justice Holmes, and look to its credit and fair name in this matter.

A new trial may have been legally obviated by the action of the State Supreme Court. We do not know as to that. But application to the State Pardoning Board and action by the Governor may commute the death sentence, and relieve Georgia from the risk of a hanging which may prove hereafter to have been little better than a common lynching—and, said the late Justice Brewer, "lynching is murder."

It is not the "sob squad" this time that is speaking for a life. It is a learned Justice of the national Supreme Court. And it is justice, not mercy, that he speaks for.

Fairness First.

From The Mobile Register.

Leo Frank may be the murderer, but the circumstances forbade that that fact should be ascertained with the cool deliberateness that justice demands. If he could be granted another trial, under assured conditions of impartiality, and again be condemned, there might still be doubt, but no one could complain that the accused had not had fair treatment.

This second trial not being obtainable, Leo Frank's case is certainly one calling for the exercise of Executive clemency.