File

No. 32 Criminal Docket,

March Term, 1914

SUPREME COURT OF GEORGIA.

Frank

versus

THE STATE.

BILL OF EXCEPTIONS.

Filed in office. JUN 30 1914

W. E. Talley, D. C. S. C. Ga.

Case No. _____ Atlanta Circuit,

Supreme Court

_____ Term, 191__

Leo M. Frank

VERSUS

The State of Ga

Bill of Exceptions

Filed in office June 9th, 1914

Arnold Broyles Clerk.

Filed in office _____ 191__

_____ Clerk.

DAILY REPORT CO. PRINTERS, ATLANTA

GEORGIA, Fulton County.

I Hereby Certify, That the foregoing Bill of Exceptions, hereunto attached, is the true original Bill of Exceptions in the case stated, to-wit:

Leo M. Frank
Plaintiff in Error.

vs

The State of Georgia
Defendant in Error.

and that a copy hereof has been made and filed in this office.

Witness my signature and the seal of Court affixed this the 30 day of June 1914

Jimmie Broyles
Clerk Superior Court Fulton County, Georgia,
Ex-Officio Clerk City Court of Atlanta.

First Division.

(A. 1)

3 CRIMINAL
October Term, 1914.

Tye, Peoples & Jordan

STATE OF GEORGIA,
COUNTY OF FULTON.

Be it remembered that at the May Term 1914 of the Superior Court of said County, there came on to be heard before Hon. B. H. Hill, Judge of said Court presiding, in the case of the State of Georgia vs. Leo M. Frank, the motion in writing, as amended, of the said Frank, upon the grounds therein set forth, to set aside the verdict of guilty of murder rendered against him in said cause. To the said motion the State of Georgia, by its Solicitor General, interposed its demurrer in writing, upon grounds both general and special.

The said hearing was had upon said demurrer, and at the conclusion thereof, during said term and on June 6, 1914, judgment was rendered by the Court sustaining said demurrer upon each and every ground thereof and dismissing the said motion of said Frank. To the said judgment the said Leo M. Frank then and there excepted and now excepts and assigns the same as error. And for more specific assignment of error he says:

That said judgment was erroneous in sustaining the first ground of the general demurrer because the ground of demurrer therein set up presents no good and sufficient reason in law why the same should be sustained and the motion dismissed; that said judgment was erroneous in sustaining the second ground of the general demurrer, because the ground of demurrer therein set up presented no good and sufficient reason in law why the same should be sustained and the motion be dismissed; that said judgment was erroneous in sustaining the third ground of the general demurrer, because the ground of demurrer therein set up presented no good and sufficient reason in law why the same should be sustained and the motion be dismissed; that said judgment was erroneous in sustaining the fourth ground of the general demurrer, because the ground of demurrer therein set up presents no good and sufficient reason in law why the same should be sustained and the motion be dismissed; that the said judgment was erroneous in sustaining the fifth ground of the general demurrer, because the ground of demurrer therein

set up presented no good and sufficient reason in law why the same should be sustained and the motion be dismissed; that said judgment was erroneous in sustaining the sixth ground of the general demurrer, because the ground of demurrer therein set up presented no good and sufficient reason in law why the same should be sustained and the motion be dismissed; that said judgment was erroneous in sustaining the seventh ground of the general demurrer, because the ground of demurrer therein set up presented no good and sufficient reason in law why the same should be sustained and the motion be dismissed; and that the said judgment was erroneous in sustaining the eighth ground of the general demurrer, because the ground of demurrer therein set up presented no good and sufficient reason in law why the same should be sustained and the motion be dismissed.

And for further assignment of error, the said Leo M. Frank, now plaintiff in error, says that the said judgment was erroneous in sustaining any and in sustaining all of the said grounds of general demurrer because none of said grounds presented, nor did all of said grounds present, any good and sufficient reason in law why his motion should be dismissed.

And for further assignment of error he says: The said judgment, in sustaining the first ground of the special demurrer, was erroneous, because said ground of demurrer presented no good and sufficient reason in law for striking that portion of the motion of plaintiff in error in said first ground of special demurrer pointed out, the said portion of the motion, as movant contends, being material and being relevant to the right of movant as set up and contended for in his said motion, and in paragraph 6th thereof, and the question set up in said 6th paragraph not having been adjudicated in the decision of the Supreme Court of Georgia as contended in said ground of special demurrer.

And for further assignment of error he says: The said judgment was erroneous in sustaining the second ground of

Tye, Peeples & Jordan

the special demurrer, because said ground of demurrer presented no good and sufficient reason in law for striking that portion of the motion of plaintiff in error in said second ground of the special demurrer pointed out, the said portion of the motion, as movant contends, being material and relevant to the assertion of the rights of movant as set forth in paragraph 7 of his said motion.

And plaintiff in error specifies as all the record material to a clear understanding of the errors complained of, the following:

1. The motion of plaintiff in error, Leo M. Frank, to set aside the verdict of guilty of murder rendered against him, together with the order of the Court thereon of April 16, 1914, the entry of filing thereon, and the acknowledgment of service made on behalf of the State of Georgia by Hon. Hugh M. Dorsey, its Solicitor General.

2. The amendment to said motion, allowed by the Court and filed June 6, 1914.

3. The demurrer, both general and special, to the said motion.

4. The judgment of the Court sustaining the demurrer and dismissing the motion.

And now, within twenty days from the date of the rendition of said judgment, and at the term of the Court at which the same was rendered, comes Leo M. Frank, as plaintiff in error, and presents this his bill of exceptions and prays that the same may be signed and certified, that the errors alleged to have been committed may be considered and corrected.

Tye, Peeples & Jordan
H. J. Haas
Leonard Haas
H. A. Alexander
Attorneys at Law for Plaintiff in Error.- Residing at Atlanta Ga

I do certify that the foregoing bill of exceptions is true and specifies all of the record material to a clear

Tye, Peoples & Jordan

understanding of the errors complained of; and the Clerk of the Superior Court of Fulton County, Georgia, is hereby ordered to make out a complete copy of such parts of the record as are in this bill of exceptions specified and certify the same as such, and cause the same to be transmitted to the Supreme Court of Georgia, now in session, that the errors alleged to have been committed may be considered and corrected.

This June 25th, 1914.

Benj. H. Hill
Judge Superior Court,
Atlanta Circuit.

No. ____________

Supreme Court of Georgia
March Term 1914

STATE OF GEORGIA

vs.

LEO M. FRANK
(Verdict of Guilty of Murder.)

Leo M Frank
Plaintiff in Error
vs
The State of Georgia
Defendant in Error

Original bill of exceptions
to judgment sustaining demurrer
to motion to set aside verdict.

Filed in office
July 6th 1914
Z. D. Harrison (?) Bagley (?)
Clerk

TYE, PEEPLES & JORDAN
ATTORNEYS-AT-LAW
ATLANTA, GA.

H. J. Haas
Leonard Haas
H. A. Alexander

Due & legal service of the within bill of exceptions acknowledged. Copy received. This July 7, 1914.
Hugh M Dorsey
Solicitor General Atlanta Circuit
Atty for deft in Error.

GEORGIA, Fulton County.

I Hereby Certify, That the foregoing Bill of Exceptions, hereunto attached, is the true original Bill of Exceptions in the case stated, to-wit:

Leo M. Frank

Plaintiff in Error.

vs.

State of Georgia.

Defendant in Error.

and that a copy hereof has been made and filed in this office.

Witness my signature and the seal of Court affixed this the 15 day of July 1914.

Arnold Broyles

Clerk Superior Court Fulton County, Georgia,
Ex-Officio Clerk City Court of Atlanta.

Case No. _____ Atlanta Circuit,

Supreme Court.

Term, 191—

Leo M. Frank

VERSUS

State of Georgia

Bill of Exceptions

Filed in office July 6 191 4

Harold Boyles Clerk.

Filed in office _____ 191—

_____ Clerk.

CORNELL & SESSIONS CO. ATLANTA 816

File

No. 3 Criminal Docket,

October Term, 1914

SUPREME COURT OF GEORGIA.

Frank

versus

THE STATE.

BILL OF EXCEPTIONS

Filed in office JUL 15 1914

W. E. Talley, D. C. S. C. Ga.

L E O M. F R A N K,

Plaintiff in error.

Vs.

T H E S T A T E O F G E O R G I A,

Defendant in error.

(I N D E X.)

(MOTION TO SET ASIDE VERDICT.)

State of Georgia, (). No. 9410.
Vs. (). Fulton Superior Court.
Leo M. Frank. ().

:--------:

GEORGIA, FULTON COUNTY.

IN THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA.

CONVICTION OF MURDER.

MOTION TO SET ASIDE VERDICT.

Now comes Leo M. Frank, the defendant in the above stated cause, against whom in said cause a verdict of guilty of murder was received by the Court on August 25th, 1913, and moves the Court to set aside said verdict for the following reasons:

1.

Because at the time that said verdict was received, and the jury trying the cause was discharged, this defendant was in the custody of the law and incarcerated in the common jail of said County. He was not present when said verdict was received, and the said jury was discharged, as he had the right in law to be, and as the law required that he should be. He did not waive said right, nor did he authorize anyone to waive it for him, not consent that he should not be present. He did not even know that said verdict had been rendered and said jury discharged, until after the reception of the verdict and discharge of the jury, and until after sentence of death had been pronounced upon him.

2.

Because while in point of fact the statements above made are true, yet the presence of this defendant at the reception of said verdict was a legal right of defendant and a requirement of law which could not be waived even by this defendant himself, the charge upon which this defendant was tried being a charge of murder, subjecting him to possible deprivation of his life, and such

waiver would be not only a renunciation of a right which the law established in his favor but would be a renunciation affecting the publuc interest.

3.

Because on the day said verdict was rendered, and shortly before Hon. L. S. Roan, the Judge who presided upon the trial of said cause, began his charge to the jury, the said Judge in the jury room of the court house wherein the trial was proceeding, privately conversed with L. Z. Rosser and Reuben R. Arnold, two of the counsel of this defendant, and in said conversation referred to the probable danger of violence that this defendant would be in if he were present when the verdict was rendered in the cause, if said verdict should be one of acquittal, and after said Judge thus expressed himself, he, the said Judge, requested said counsel to agree that this defendant need not be present at the time the verdict was rendered and the said jury polled. Under these cirsumstances the said counsel did agree with the said Judge that this defendant should not be present at the rendition of said verdict. In the same conversation the said Judge expressed the opinion, also, to said counsel that even counsel of this defendant might be in danger of violence if they should be present at the receiption of said verdict. Under these circumstances defendant's counsel, said Rosser and said Arnold, did agree with the said Judge that this defendant should not be present at the rendition of the verdict. This defendant was not present at said conversation and knew nothing about the same or of any agreement made, as above stated, until after the verdict was received and the jury discharged, and until after sentence of death was pronounced upon him.

Pursuant to the conversation above stated, neither the said Rosser, nor the said Arnold, nor Herbert J. Haas, nor Morris Brandon who were the sole counsel of this defendant in said cause, were present when the said verdict was received and said jury discharged; nor was this defendant present when said verdict was rendered and the said jury discharged. Defendant says: (1) He did not give to said counsel, the said Rosser and the said Arnold nor to anyone else, any authority to waive or renounce the right

of this defendant to be present at the reception of said verdict, or to agree that this defendant should not be present thereat; and the relation of attorney and client did not give them such authority, though said counsel acted in the most perfect good faith and in the interest of the personal safety of this defendant. Neither the said conversation, with Judge Roan, nor the purport thereof, was communicated to said Haas, nor did said Haas know thereof until after sentence was pronounced on defend ant. (2). Defendant did not give to said Rosser, nor to said Arnold, nor to said Haas or Brandon any authority themselves to be absent when said verdict was received, nor did he agree that they or either of them might be so absent. (3). The said agreement, made by the said Rosser and the said Arnold, even if otherwise it could be of any binding force and effect, upon this defendant, was of no legal force and effect, so far as the presence of this defendant at the ~~receipt~~ reception of said verdict was concerned, because the same was made under and because of thesaid statement, made as above stated to the said Rosser and the said Arnold by the Judge who was presiding upon and at said trial, that there was probable danger of violence to this defendant should he be present when said verdict was rendered, should the verdict be one of acquittal and because they, the said Rosser and the said Arnold were induced to make said agreement because of said statement so made to them, believing the same to be true and believing that for this defendant to be so present, if the verdict should be one of acquittal, might subject this defendant to serious bodily harm and even to the loss of his life.

4.

Defendant says upon and because of each of the grounds above stated and, also, upon and because of all of them, the said verdict was and is of no legal force and effect and the same is void. (1) That the reception of said verdict, in the involuntary absence of this defendant, while he was so, as aforesaid, in the custody of the law and incarcerated in jail, was contrary to law and was in violation of the legal rights of this defendant. (2) Defendant says that the reception of said verdict in the involuntary absence

of this defendant while he was so confined in jail, was in violation of and contrary to the provisions of Art. 1, Sect. 1, Par. 3 of the Constitution of the State of Georgia, providing that "no person shall be deprived of life, liberty or property, except by due process of law", the said reception of said verdict during the involuntary absence of this defendant and while he was confined in jail depriving the proceedings against him of the character of a trial to which he was entitled under the law and depriving him of the hearing and the opportunity to be heard, in his own defence to which he was entitled under the law and to which he was entitled under the said provision of the Constitution of the State of Georgia. (3). Defendant says that the said reception of said verdict in the involuntary absence of this defendant while he was so confined in jail, was in violation of and contrary to the provisions of Art. 6. Sec. 18, Par. 1 of the Constitution of the State of Georgia, that "The right of trial by jury, except where it is otherwise provided in the Constitution, shall remain inviolate", because the right of trial by jury under the laws of the State of Georgia extended to and covered with its protection the right of this defendant to be present in person at the reception of the verdict against him in said cause, and because the reception of said verdict during the involuntary absence of this defendant and while he was so confined in jail was in violation of the right of trial by jury to which this defendant was entitled, said right including the right of this defendant to be present at the reception of the said verdict and to be then and there heard in his own defense.

(4) Defendant says that the said reception of said verdict in the involuntary absence of this defendant, while he was so confined in jail, tended to deprive him of his life and liberty without due process of law, and that the same denied to him the equal protection of the laws, contrary to and in violation of the provisions of the (14th) Fourteenth Amendment to the Constitution of the United States, to-wit: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws", the said reception of said verdict during the

involuntary absence of this defendant and while he was confined in jail depriving the proceedings against him of the character of a trial to which he was entitled under the law and depriving him of the hearing and the opportunity to be heard in his own defense to which he was entitled under the law and to which he was entitled under the said provision of the Constitution of the United States; and this defendant claims the protection of said provision.

5.

Defendant says that the said reception of said verdict in the involuntary absence of this defendant and while he was so incarcerated in jail, and in the said absence of this defendant's counsel under the circumstances as above stated, was contrary to and in violation of the provisions of Art. 1, Sec. 1, Par. 5 of the Constitution of the State of Georgia, to-wit: "Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel," because this defendant under and because of the said circumstances as above set forth was deprived of the presence of his counsel and of the benefit of counsel at the reception of said verdict, to which he was in law and under said constitutional provision entitled; and for and because of the same said conditions and circumstances the reception of said verdict was in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" in that this defendant was under the said conditions and circumstances deprived of the rightto the benefit of counsel and of the presence of his counsel at the reception of said verdict, and defendant claims the protection of the said amendment.

6.

Because the said Judge Hon. L. S. Roan, upon considering the motion for a new trial made by this defendant, after the reception of said verdict as above stated, rendered his judgment denying said motion and in rendering said judgment stated that the jury had found the defendant guilty; that he, the said Judge

had thought about this cause more than any other he had ever tried; that he was not certain of the defendant's guilt; that with all the thought he had put on this case, he was not thoroughly convinced that Frank was guilty or innocent, but that he did not have to be convinced; that the jury was convinced; that there was no room to doubt that; that he felt it to be his duty to order that the motion for a new trial be overruled. This defendant says that under the provisions of the Fourteenth Amendment to the Constitution of the United States, no State could deprive this defendant of his life or liberty without due process of law, nor deny him the equal protection of the laws, and that he has not been afforded due process of law, and that he has been denied the equal protection of the laws, in that the said Judge, in so as aforesaid denying to him a new trial in said cause, did not, as shown by his said statement, give to this defendant the judicial determination of said motion to which defendant was entitled by law; that said Judge being constituted by law as one of the triors did not afford to this defendant the protection which the law guarantees, the law being that defendant is entitled to the benefit of every reasonable doubt, the presumption of innocence being in defendant's favor, and the trial judge, though entertaining the doubt which he felt as to this defendant's guilt, and nevertheless denying to him a new trial, by said action denied to this defendant the fair and lawful trial he is entitled to, and thereby this defendant has been denied the due process of law.

7.

Because that fair and impartial trial was not accorded defendant which is guaranteed to him by the Constitution of the United States, as contained in the Fourteenth Amendment to said Constitution, to-wit: "nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." In support of this ground movant alleges that the court room wherein this trial was had had a number of windows on the Pryor Street side looking out on a public street of Atlanta, and furnishing easy access to any noises that might occur upon the street; that there is an open alley way running from Pryor Street on the side of the court house, and there

are windows looking out from the court room into this alley, and that crowds collected therein, and any noises in this alley could be heard in the court room; that these crowds were boisterous, and that on the last day of the trial after the case had been submitted to the jury, a large and boisterous crowd of several jundred people were standing in the street in front of the court house, and as the Solicitor General came out greeted him with loud and boisterous applause, taking him upon their shoulders and carrying him across the street into a building wherein his office was located; that this crowd did not wholly disperse during the interval between the giving of the case to the jury and the time when the jury reached its verdict, but during the whole of such time a large crowd was gathered at the junction of Pryor and Hunter streets; that several times during the trial the crowd in the court room, and outside of the court room, which was audible both to the court and jury, would applaud when the State scored a point; a large crowd of people standing on the outside cheering, shouting and hurrahing, and the crowd within the courtroom signifying their feelings by applause and other demonstrations, and on the trial, and in the presence of the jury, the trial judge in open court conferred with the Chief of Police of Atlanta, and the Colonel of the Fifth Georgia Regiment stationed in Atlanta, which had the natural effect of intimidating the jury, and so influencing them as to make impossible a fair and impartal consideration of defendant's case; indeed, such demonstrations finally actuated the Court in making the request of defendant's counsel, Messrs Rosser and Arnold, as detailed in paragraph three of this motion, to have defendant, and the counsel themselves to be absent at the time the verdict was received in open court, because the Judge apprehended violence to defendant and his counsel; and the apprehension of such violence naturally saturated the minds of the jury so as to deprive this defendant of a fair and impartial consideration of his case, which the Constitution of the United States in the Fourteenth Amendment hereinbefore referred to, entitled him to.

On Saturday, August 23rd, 1913, previous to the rendition of the verdict on August 25th, the entire public press of Atlanta appealed to the Trial Court to adjourn court from Saturday to

Monday, owing to the great public excitement, and the Court adjourned from Saturday, 12:00 o'clock M., to Monday morning, because he felt it unwise to continue the case that day, owing to the great public excitement, and on Monday morning the public excitement had not subsided, and was as intense as it was on Saturday previous. And when it was announced that the jury had reached a verdict, the trial judge went to the court room and found it crowded with spectators, and fearing violence in the court room, the Trial Judge cleared it of spectators, and the jury was brought in for the purpose of delivering their verdict. When the verdict of guilty was announced, a signal was given to the crowd on the outside to that effect. The large crowd of people standing on the outside cheered and shouted as the jury was beginning to be polled, and before more than one juror had been polled the noise was so loud and confusion so great that the further polling of the jury had to be stopped so as to restore order, and so great was the noise and cheering and confusion from without that it was difficult for the court to hear the responses of the jurors as they were being polled, though the court was only ten feet distant from the jury, All of this occurred during the involuntary absence of this defendant, he being at the time in the custody of the law and incarcerated in Fulton County jail, his absence from the court room having been requested by the Court on account of fear of violence to said defendant as herebefore recited.

Wherefore the premises considered, the defendant prays that the said verdict be set aside and go for naught. Defendant prays that a rule be granted calling upon the State of Georgia, by its Solicitor General, to show cause at a time to be fixed by the Court, why the prayers of this petition should not be granted, and that in the meantime and until the further order of this Court the execution of the sentence of death which has been pronounced against this defendant be stayed.

Tye, Peeples & Jordan,
Henry A. Alexander,
Leonard Haas,
Herbert J. Haas.
Counsel for Leo M. Frank.

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STATE OF GEORGIA,

COUNTY OF FULTON.

In person appeared before me Leo M. Frank, who being duly sworn says: He has read the motion above set forth and is familiar with the contents thereof. Deponent says that each and all of the statements thereof as to anything which was done or said by this deponent and as to anything within the knowledge of this deponent are true. Deponent says that all the other statements made in said motion he is informed and believes are true.

Leo M. Frank.

Sworn to and subscribed before me,
this 15th day of April, 1914.
Montefiare Selig,
N. P. Fulton County, Ga.

The above motion being presented and read, it is ordered that the same be filed and a copy thereof be served upon Hugh M. Dorsey, Esq., as Solicitor General of the Atlanta Circuit, and that the State of Georgia, by its said Solicitor General, show cause before me on the 23rd day of April 1914, at 10 o'clock A. M. or as soon thereafter as the hearing can be had, why the prayers of said motion should not be granted. In the meantime and until the further order of the Court, the execution of the sentence of death which has been passed upon the defendant be and it is hereby stayed.

This April 16, 1914.

Benj. H. Hill,
Judge Fulton Superior Court.

Filed in office this the 16th day of April 1914 At 10:40 A. M.

John A. Jones Deputy Clerk

Service acknowledged. April 18th, 1914.

E. A. Stephens, Hugh M. Dorsey,
Sol. Gen'l.

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(AMENDED MOTION.)

GEORGIA, FULTON COUNTY.

Now comes Leo M. Frank, and, with leave of the Court, amends his above stated motion as follows: By inserting between the word "and" and the words "until after sentence of death," in the last sentence of the paragraph numbered one of said motion, the words "did not know of any waiver of his presence made by his Counsel", so that said sentence as amended will read:

"He did not even know that said verdict had been rendered and said jury discharged until after the reception of the verdict and discharge of the jury, and did not know of any waiver of his presence made by his counsel until after sentence of death had been pronounced upon him."

Tye, Peeples & Jordan,
H. A. Alexander,
Leonard Haas,
Herbert J. Haas.
Attys. for Leo M. Frank.

The above amendment allowed. This June 6, 1914.

B. H. Hill,
Judge Superior Court, Atlanta Circuit.

Service above amendment acknowledged. Copy received. This June 6, 1914.

Hugh M. Dorsey,
Solicitor General, Atlanta Circuit.

Filed in office this the 6th day of June, 1914.

John H. Jones, D. Clk.

(D E M U R R E R.)

GEORGIA, FULTON COUNTY.

The State of Georgia responding to the motion to set aside verdict in the above stated case says by way of demurrer:

GENERAL DEMURRER.

1. Said 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 record, and the motion filed is not one predicated upon any defect appearing on the face of the pleadings or the record.

2. Said motion should be dismissed because it affirmatively appears from paragraph 6 of the motion to set aside the verdict, that the Defendant Leo M. Frank made a motion for a new trial, which said motion was denied by the Court, and as a matter of law if said verdict was rendered at a time when this defendant was not present in Court, such irregularity should have been included among the grounds of the motion for a new trial, and as a matter of law is conclusively presumed to have been incorporated and embodied in said motion for a new trial, which said motion as aforesaid was heard and denied, as is shown by this petition.

3. Said motion should be dismissed because same shows a course of conduct on the part of the Defendant Leo M. Frank which amounts to an estoppel.

4. Said motion should be dismissed because this petition and the record of the decision of the case of Leo M. Frank against the State of Georgia rendered by the Supreme Court of Georgia, affirmatively shows a course of conduct that amounts to and constitutes an estoppel.

5. Said motion should be denied because the same affirmatively discloses that counsel ~~for~~ said Leo M. Frank agreed with the Court that said Defendant should not be present at the rendition of the verdict. This agreement on the part of counsel was and

is binding on the said Leo M. Frank, and effectively constitutes a waiver.

6. Said motion should be dismissed because this petition in conjunction with the decision of the Supreme Court of Georgia in the case of Leo M. Frank against the State of Georgia, affirmatively shows that said Frank after a knowledge of this waiver 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.

7. Said motion should be dismissed because it affirmatively appears from the same that the jury rendering the verdict in question were polled, and the presence of the defendant is necessary for himself mainly in order to exercise his right to poll the jury.

The presence of said Defendant Frank in the Court room could not have secured or obtained for him any right whatsoever beyond the mere matter of polling the jury, which this petition affirmatively discloses on its face was done.

8. Said motion should be dismissed because this petition and the decision of the Supreme Court of Georgia in the case of Frank against the State affirmatively discloses that the verdict of guilty was received in open Court and a poll of the jury demanded on behalf of this Defendant, and that said poll of said jury was in conformity with every requirement of law.

Wherefore, by reason of the above and foregoing general demurrer the State insists that this motion to set aside the verdict should be dismissed.

SPECIAL DEMURRER.

Further, the State demurs specially to the following parts of the petition as aforesaid, and moves the Court to strike the same because they are wholly immaterial and irrelevant to any right which the Defendant Leo M. Frank might have even if he was denied any right, and has not been estopped or did not waive the same.

Said parts demurred to specially are as follows:

1. In paragraph 6 of said petition the following language, viz: "Because, Hon. L. S. Roan, stated that the jury had found the defendant guilty; that he, the said Judge, had thought about this cause more than any other he had ever tried; that he was not certain of the Defendant's guilt; that with all the thought he had put on this case, he was not thoroughly convinced that Frank was guilty or innocent, but that he did not have to be convinced; that the jury was convinced; that there was no room to doubt that"

This Defendant says that under the provisions Amendment to the Constitution of the United States, no State could deprive this Defendant of his life or liberty without due process of law, nor deny him the equal protection of the law, and that he has not been afforded due process of law, and that he has been denied the equal protection of the laws, in that the said Judge, in so, as aforesaid, denying to him a new trial in said cause, did not, as shown by said statement, give to this Defendant the judicial determination of said motion to which the Defendant was entitled by law; that said Judge being constituted by law as one of the triors did not afford to this Defendant the protection which the law guarantees, the law being that Defendant is entitled to the benefit of every reasonable doubt, the presumption of innocense being in the Defendant's favor, and the Trial Judge, though entertaining the doubt which he felt as to this Defendant's guilt, and nevertheless denying to him a new trial, by said action denied to this Defendant the fair and lawful trial he is entitled to, and there by this defendant has

been denied the due process of law."

The State insists that in no event could this paragraph be pertinent or material, this question having been adjudicated in the decision of the Supreme Court of the State of Georgia in head note 19 in the case of Leo M. Frank against the State of Georgia, adversely to the said Frank's contention as aforesaid, said adjudication being now the law of the case and not susceptible of being again reviewed and called in question here or elsewhere.

3. The following portions of paragraph 7 should be stricken because the same are wholly immaterial and unnecessary to any legal rights that the said Defendant Leo M. Frank may have.

"In support of this ground, movant alleged that the Court Room wherein this trial was had, had a number of windows on the Pryor Street side looking out on a public street of Atlanta, and furnishing easy access to any noises that might occur upon the street; that there is an open alley-way running from Pryor Street on the side of the Court House, and there are windows looking out from the Court Room into this alley, and that crowds collected therein, and any noises in this alley could be heard in the Court Room; that these crowds were boisterous, and that on the last day of the trial, after the case had been submitted to the jury, a large and boisterous crowd of several hundred people were standing in the street in front of the Court House, and as the Solicitor General came out greeted him with loud and boisterous applause, taking him upon their shoulders and carrying him across the street into a building wherein his office was located; that this crowd did not wholly disperse during the interval between the giving of the case to the jury and the time when the jury reached its verdict, but during the whole of such time a large crowd was gathering at the junction of Pryor and Hunter streets; that several times during the trial, the crowd in the court room and outside of the court room, which was audible both to the Court and the jury, would applaud when the State scored a point, a large crowd of people standing on the outside cheering, shouting and hurrahing, and the crowd

within the court room signifying their feelings by applause and other demonstrations; and on the trial, and in the presence of the jury, the trial Judge in open court conferred with the Chief of Police of Atlanta, and the Colonel of the Fifth Georgia Regiment, stationed in Atlanta, which had the natural effect of intimidating the jury, and so influencing them as to make impossible a fair and impartial consideration of Defendant's case; indeed, such demonstrations finally actuated the Court in making the request of Defendant's counsel, Messrs. Rosser and Arnold, as detailed in paragraph three of this motion, to have Defendant, and the counsel themselves to be absent at the time the verdict was received in open court, because the Judge apprehended violence to Defendant and his counsel; and the apprehension of such violence naturally saturated the minds of the jury so as to deprive this Defendant of a fair and impartial consideration of his case, which the Constitution of the United States in the Fourteenth Amendment hereinbefore referred to, entitled him to.

On Saturday, August 23, 1913, previous to the rendition of the verdict on August 25th, the entire public press of Atlanta appealed to the Trial Judge to adjourn Court from Saturday to Monday, owing to the great public excitement, and the Court adjourned from Saturday, 12:00 o'clock M., to Monday morning, because he felt it unwise to continue the case that day, owing to the great public excitement, and on Monday morning the public excitement had not subsided, and was as intense as it was on Saturday previous. And when it was announced that the jury had reached a verdict, the Trial Judge went to the Court Room and found it crowded with spectators, and fearing violence in the Court Room, the Trial Judge cleared it of spectators, and the jury was brought in for the purpose of delivering their verdict. When the verdict of guilty was announced, a signal was given to the crowd on the outside to that effect."

Wherefore the State insists that said special demurrer should be sustained, and said quoted paragraphs stricken from the petition of said Leo M. Frank, herein referred to, if and in the event the Court refuses to dismiss the entire petition, as the State insists should be done under and by reason of the general

demurrer herein previously referred to.

E. A. Stephens,
Hugh M. Dorsey,
Solicitor General.

Filed in office this the 5th day of June, 1914.
John H. Jones, D. Clk.

(ORDER ON DEMURRER.)

Upon considering the above and foregoing demurrer and after argument the same is hereby sustained on each and every ground and the mation to set aside the verdict Vs., said Leo M. Frank is dismissed.

This June 6, 1914.

Benj. H. Hill,
Judge Superior Court.

STATE OF GEORGIA,
County of Fulton.

I Hereby Certify, That the foregoing pages, hereunto attached, contain a true Transcript of such parts of the record as are specified in the Bill of Exceptions and required, by the order of the Presiding Judge, to be sent to the Supreme Court in the case of

Leo M. Frank,
Plaintiff in Error.

vs.

State of Georgia,
Defendant in Error.

Witness my signature and the seal of Court affixed this the 25 day of July 1914

Arnold Broyles
Clerk Superior Court Fulton County, Georgia
Ex-Officio Clerk City Court of Atlanta.

File No. Supreme Court Atlanta Circuit,

Term, 191—

Leo M. Frank

VERSUS

State of Georgia

Transcript of Record

Filed in office 191—

Clerk.

CORNELL & SESSIONS CO. ATLANTA 816

File 11567

No. 3. Criminal Docket,

October Term, 1914

SUPREME COURT OF GEORGIA.

Frank

versus

THE STATE.

11567

TRANSCRIPT OF RECORD

Filed in office JUL 15 1914

W. E. Talley, D. C. Ga.