

# WAY IS PAVED TO TAKE CASE OF LEO M. FRANK BEFORE FEDERAL COURT

Through New Attorneys  
Claim Is Made That the  
Prisoner's Constitutional  
Rights Were Violated  
When He Was Not  
Brought Into Court to  
Hear Jury's Verdict.

**DECLARES HIS LAWYERS  
HAD NO RIGHT TO WAIVE  
HIS PRESENCE IN COURT**

Judge Ben Hill Fixes Hear-  
ing on Extraordinary Mo-  
tion and on Petition of the  
New Attorneys for Next  
Wednesday Morning—At-  
torneys Make Statements.

In event the fight is lost, in the  
courts of Georgia, to save the life of  
Leo M. Frank, the way was paved yes-  
terday to carry his case before the  
highest tribunal of our land—the  
United States supreme court in Wash-  
ington.

This was made possible at 10 o'clock  
Thursday morning when Attorney John  
L. Tye, recently employed by Leo  
Frank, brought out before Judge Ben  
Hill during the retrial motion pro-  
ceedings of the defense, the first con-  
stitutional rights issue of the Frank  
case.

Attorney Tye argued that the pris-  
oner was unaware of the action of his  
attorneys, L. Z. Rosser and Reuben  
R. Arnold, in waiving his appearance  
in the courtroom at the time the ver-  
dict was rendered last August. He  
declared that the defendant is consti-  
tutionally entitled to being present at  
such a time, and that counsel had no  
legal right to waive his presence on  
counsel's own initiative.

#### Asks Verdict Set Aside.

Mr. Tye made a motion to set aside  
the verdict of the court on this par-  
ticular ground. The motion was filed  
before Judge Hill, and will be argued  
next Wednesday morning at 10 o'clock,  
at which time Judge Hill has set the  
date for the retrial hearing in his  
chambers in the old city hall build-  
ing.

Attorney Tye's motion created a  
great surprise. The reading of his  
document preceded the filing of the  
motion for a new trial by Attorneys  
Arnold and Rosser on grounds of  
newly-discovered evidence.

It was even a surprise that the firm  
of Tye, Peoples & Jordan had been  
employed in the Frank defense. Mem-  
bers of Frank's counsel stated Thurs-  
day afternoon that this concern had  
been employed only recently, and that  
it was brought into the case by Frank  
himself.

Mr. Tye's motion was based simply  
on the ground that the law insists  
that a defendant has not the right—  
and neither has counsel—to waive his  
presence at the time of a verdict's  
announcement. Furthermore, that  
Frank knew nothing of the action of  
his lawyers in waiving his presence  
on the day the verdict of guilty was  
pronounced.

"Frank was deprived of his legal  
right to be in court at the time the ver-  
dict was rendered," said Mr. Tye. "It  
is a constitutional rights issue."

#### Stay of Execution.

Following the filing of both motions,  
Judge Hill ordered a rule nisi served on  
Solicitor Hugh Donsey, which demands  
him to make a counter showing when  
the re-trial motions come up for argu-  
ment Wednesday, and which also indef-  
initely stays the execution of Leo  
Frank, which was scheduled for this  
morning between the hours of 11 and  
1 o'clock.

An exciting phase of the re-trial ap-  
plication Thursday was a lively tilt  
that ensued between Attorneys Rosser  
and Arnold and Attorney Bill Smith,  
counsel for Jim Conley, when Mr.  
Arnold, in calling the names of a num-  
ber of witnesses to be presented in their  
new trial movement, named Mr. Smith  
as one of the proposed witnesses who,  
he understood, had refused to make an  
affidavit.

Mr. Smith, who was sitting a few  
feet in the rear of Mr. Arnold, arose  
instantly to his feet, saying to the  
court:

"I have not refused to make any af-  
fidavit."

Mr. Arnold turned politely to the  
speaker, saying:

"I understand, Mr. Smith that Mr. J.  
P. Fife had said that you would not  
make the affidavit"

"Mr. Fife is mistaken," answered  
make the affidavit."

Whereupon Smith went to where Mr.  
Fife was sitting in the courtroom,  
bringing him before Judge Hill, asking  
this question:

"Did you ever state that I had re-  
fused to make such an affidavit?"

"No," was the answer. At which the  
matter was ended.

#### Witnesses for Defense.

The witnesses to be called by the de-  
fense in the hearing next Wednesday  
were announced Thursday as E. A.  
Stephens, assistant solicitor general;  
Detective John Black, of police head-  
quarters, a star witness for the state;  
Bill Smith Conley's attorney; Dr. Roy  
F. Harris, and Mary Rich, the woman  
witness who tells of having seen Con-  
ley emerge from the rear of the pencil  
factory at 2:15 o'clock on the day of  
the Phagan tragedy.

The statement of Dr. Harris will be  
one of the most important foundations  
for the fight of the defense. It relates  
to his opinion that the hair found upon  
the lathing machine in the pencil fac-  
tory did not compare with strands  
taken from the head of the murdered  
girl.

Dr. Harris made an affidavit Thurs-  
day morning shortly after the motions  
had been filed. So did John Black, the  
detective, and Mr. Stephens and Bill  
Smith. They will be presented during  
the argument.

#### Attorney Tye's Motion.

The first clause of Attorney Tye's

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# WAY IS PAVED FOR CASE OF LEO FRANK

*Continued From Page One.*

motion, which practically covers the entire document, is as follows:

"Because at the time said verdict was received and the jury trying the cause was discharged, the defendant, Leo M. Frank, was in the custody of the law and incarcerated in the common jail of Fulton county. He was not present when said verdict was returned and the said jury discharged, as he had the right of the 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, nor 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 the discharge of the jury, and until after sentence of death had been passed upon him."

Relative to the action of Attorneys Arnold and Rosser in waiving the presence of their client, the motion reads:

"Defendant did not give to Rosser or Arnold or to Haas any authority to themselves be absent nor to be absent himself, when said verdict was received and jury discharged, of which he was not aware until after sentence of death had been passed upon him."

### **Denied Constitutional Right.**

The document declares that Frank's absence from the court at the time of the verdict was involuntary, and that he was denied the constitutional rights allowed him by the state and national laws. The motion is signed by Leonard Haas, Tye, Peoples & Jordan, H. A. Alexander and H. J. Haas.

Regarding the connection of Attorney Tye and his firm with the defense, Reuben R. Arnold and Luther Z. Rosser stated to the press Thursday afternoon that in nowise do they appear as counsel in the motion filed by Mr. Tye.

"During the trial of Mr. Frank," the two attorneys stated, "feeling against him on the part of some members of the public was so evident and pronounced as to greatly concern the trial judge for Frank's safety in the event of his acquittal. During the trial, the judge called attention several times to the danger of having Frank present at the reception of the verdict.

"Nothing, however, was done about this until the last day of the trial, and just a few minutes before the jury was charged. The judge again expressed grave apprehension and fear of Frank's safety should he be present at the reception of the verdict should it be a verdict of acquittal. We, as two of Frank's counsel, were present when the judge so expressed himself and the judge requested us to agree that Frank should not be present when the verdict of the jury was rendered, and that his counsel also should not be present. To this we agreed.

### **We Were Not Present.**

"In the stress of excitement and in the multitude of things we had to do it never occurred to us to mention our agreement with the court, either to Mr. Frank or to our associate counsel. As a matter of fact, neither our associate counsel nor Mr. Frank was present.

"Because of our participation in the agreement with the judge, as counsel, we feel that we ought not to take part as attorneys in the motion to set the judgment aside upon the ground of Frank's absence. The case is Leo Frank's, not ours, and it is his life, alone, that is at stake. Frank made no agreement with the court and was asked to make none. If, as a result of what happened he has been deprived of his legal rights, no fair-minded man can complain when Frank asks the law to correct a wrong done him.

"No agreement of this kind would ever have been made under sane and normal conditions. The agreement was made and carried out on both sides with the utmost good faith in promotion of what was thought to be in interest of Frank's safety and of public tranquillity."

### **Burns' Report Nearly Ready.**

Attorney Reuben R. Arnold said to a reporter for The Constitution last night that the report of Detective Burns would positively be submitted before next Wednesday. He said also that Burns was expected back some time this week, possibly tomorrow.

"We do not know where Burns is at present," he said. "He did not even tell us. Neither do we know what phase of evidence he is working on. All that we have got from him is the assurance that his report will be made before the arguments on the retrial motion."

Solicitor Dorsey will return to Atlanta today from Valdosta, where he has been visiting. He was not present when the motions were filed before Judge Hill Thursday. His office was represented by E. A. Stephens, Dorsey's assistant.