

# FRANK CASE APPEAL MAY YET BE GRANTED

Federal Judge Inclined to Certify  
It for the United States  
Supreme Court.

## REFUSES HABEAS CORPUS

For Lack of Jurisdiction, but Will  
Decide Tomorrow Whether to Aid  
Appeal to Highest Court.

*Special to The New York Times.*

ATLANTA, Ga., Dec. 19.—Judge W. T. Newman in the United States District Court, this afternoon, denied the application for a writ of habeas corpus brought by Attorneys Henry Peeples and Harry Alexander in behalf of Leo M. Frank. But in denying the application, Judge Newman took under consideration the application of the attorneys for Frank for the right to appeal to the United States Supreme Court. The petition for an appeal will be passed upon by Judge Newman Monday.

There was some confusion regarding the appeal and it first was announced that Judge Newman had granted it. The Judge stated tonight, however, that his announcement was that he was "inclined to grant the appeal." Under a Federal statute a Federal Judge, in granting an appeal in habeas corpus proceedings, must issue a certificate stating that in his opinion there is a "probable cause for appeal." Frank's lawyers contend the case will go up automatically no matter how Judge Newman may rule.

Judge Newman announced his decision denying the writ of habeas corpus immediately after the conclusion of the argument by the petitioning attorneys and without calling on the State, represented by Solicitor General Hugh Dorsey and Attorney General Warren Grice, to present their side of the case. When Mr. Alexander had concluded, Judge Newman said:

"When this application was presented to me I asked the Solicitor General and the Attorney General to be present at the hearing. However, it is unnecessary to hear from them. This matter has been tried in the State courts. The State Supreme Court held that it did not present a Federal question, or, if one had been presented, that it should have been embodied in the motion for a new trial.

"This decision was taken before the Justices of the United States Supreme Court, and Justices Lamar and Holmes held that it was for the States to determine their method of practice, and that what was done in the State courts was a matter of practice and involved no Federal question. The status of the case seems to be the same here as when it went to the United States Supreme Court. In view of this, I have not the jurisdiction or the power to grant the writ. It, therefore, follows that the petition is denied."

### Dorsey Asks for Time.

Attorney Peeples immediately inquired if Judge Newman would certify an appeal to the United States Supreme Court. Judge Newman asked Solicitor Dorsey if he wished to enter any objection to allowing such an appeal. The Solicitor said that this was a new proposition, and that he did not know that the State was prepared to do more than object. He said he would like to be allowed until Tuesday to examine into the State's rights in the case. He said that if Frank was not entitled to the right of appeal he would like the application to be denied.

Mr. Dorsey then took his seat, and Judge Newman made an announcement that was taken at the time to indicate that he would allow the appeal. An appeal would place the Frank case regularly on the calendar of the United States Supreme Court, and automatically operate to stay the execution of sentence until the United States Supreme Court had disposed of the matter. It is said to be probable that the case will be heard by the Supreme Court within the next sixty days, as it is understood to be the custom of the court to give capital cases the right of way. The case would not come up for consideration for nearly two years unless an application to advance it should be granted.

There was a great crowd in Judge Newman's court when the hearing was begun. This was started with the reading of the petition by Attorney Peeples, who, with Mr. Alexander, had prepared and filed it. Attorneys Herbert and Leonard Haas, also of counsel for Frank were in the court room, but rather as spectators than as attorneys. The State was represented by Solicitor General Dorsey, his assistant, E. A. Stephens, and Attorney General Grice.

When Attorney Peeples had finished reading the petition, Judge Newman asked him if he had any authorities to cite in support of the legal points set forth.

Mr. Peeples said he doubted the necessity of citing authorities in view of the fact that no objection had been raised to the issuance of the writ.

Judge Newman said he was ready to hear the authorities if Mr. Peeples had any, and Mr. Peeples thereupon read his citation, after which he entered upon his argument in support of the petition. He was interrupted in a few moments by Judge Newman, who inquired whether any Federal question had been raised in the motion for a new trial for Frank. Mr. Peeples replied that no such question had been raised, but that the motion did include a reference to the fact that Frank was not present in

Continued on Page 12.

# FRANK CASE APPEAL MAY YET BE GRANTED

Continued from Page 1.

court at the time the verdict was rendered. He added, however, that the motion to set aside the verdict did raise a specific Federal and constitutional question. He then read the head notes of the Georgia Supreme Court's decision denying Frank's motion to set aside the verdict.

## Due Process of Law Violated.

Mr. Peeples inferred from this decision that the State Supreme Court treated Frank's absence from the courtroom merely as incidental, and treated his presence in the courtroom as a right which he might waive. He declared that Frank's right to be present when the verdict was returned was an essential and fundamental right guaranteed to him by the Constitution of the United States, and that infraction of this right violated the due process of law guaranteed to all citizens. He said the fact that Frank was in the custody of the State, and therefore kept away by the State, was the same as if he had never been notified to be present. He argued that Frank himself could not expressly waive his presence, and that certainly he could not by implication acquiesce in a waiver by his counsel.

"This right," reiterated Mr. Peeples, "is a fundamental right, your Honor, and not an incidental right."

Referring to the probable attitude of the United States District Court toward the petition for a writ of habeas corpus, Mr. Peeples said:

"We well know, your Honor, that this court would hesitate and seriously consider before interfering with judgments rendered by State courts. We also know that this and other United States District Courts have held that a writ of habeas corpus of this kind cannot be used as a function for a writ of error. But these courts have held on numerous occasions that if at any time the State courts lose jurisdiction of a case, the Federal courts can on appeal examine and determine whether jurisdiction has been maintained, and, if not, can discharge the prisoner."

Mr. Peeples cited authorities in support of his contention. Continuing, he said:

"We realize, your Honor, that on the very threshold here we are met by the question of difference between an application to the United States Supreme Court for a writ of error and an application to this court for a writ of habeas corpus. There is a fundamental difference. The jurisdiction of the Supreme Court on a writ of error from a State court is very narrow and restricted. But on a writ of habeas corpus the United States District Court has the discretion and latitude to examine and determine whether a State court has lost jurisdiction. As I say, the difference is a wide one and a fundamental one."

## Quotes Lamar and Holmes.

Mr. Peeples here read the statements of Justices Lamar and Holmes of the United States Supreme Court, when they denied Frank's application for a writ of error. He emphasized the fact that this denial was based on the decision of the Georgia Supreme Court in holding that Frank had not followed the State's procedure when he failed to include absence from the courtroom as a denial of a constitutional right in his motion for a new trial.

It was argued by Mr. Peeples that these Justices, in the necessary hurry and limited time at their disposal, had misconceived the essential point in the State Supreme Court's decision. He contended that the ruling relating to procedure was not of such fundamental importance as the ruling, in effect, that Frank's right to be present was incidental and could be waived. Mr. Peeples read and commented on the opinion expressed by Justice Holmes in denying the petition for a writ of error, in which the Justice said he seriously doubted if Frank, because of the atmosphere and excitement surrounding his trial, had had fair and impartial justice. Mr. Peeples said:

"We take a different view of this case from the view taken by the Supreme Court of Georgia in holding that absence from the courtroom was a mere incident of the trial and a right which the defendant could waive. We hold that it is a fundamental right which cannot be waived. The Supreme Court of Georgia held before that a motion for a new trial was the proper remedy for the point which Frank makes in his motion to set aside."

Mr. Peeples explained that there were two different kinds of relief involved

—a motion to set aside and a motion for a new trial. In a motion for a new trial, in the event of success, the defendant would simply have another trial. But in a motion to set aside a verdict as a nullity, such as the motion made by Frank, the defendant, in the event of success, could set up a plea of second jeopardy and by that means obtain his freedom. Therefore, Mr. Peeples argued, it would be depriving Frank of a fundamental right to force him to make the point of absence from the court room in a motion for a new trial.

## Frank's Absence Enforced.

He dwelt on the importance of the right of a prisoner to be present when a verdict is returned and referred to an instance cited by Justice Belckley, of the Georgia Supreme Court, of a case in Fayette County, where a jury brought in a unanimous verdict of guilty; but when the jury was being polled one juror suddenly declared that it was not his verdict. The jury was sent back and finally returned a verdict of not guilty. Mr. Peeples emphasized the fact that Frank was held away from court at the time the verdict was returned by the order of the court. He said that in a measure Frank was forced to stay away.

At the conclusion of the argument of Mr. Peeples, Attorney Alexander began his argument. Mr. Alexander discussed at some length the history and functions of the writ of habeas corpus.

"This matter," he said, "involves one of the gravest questions that can come before a Federal court. To a large extent it is a new question. It is a question which prior to this case was already being considered by the lower Federal court, and there had been some discussion on it by Judges of the Circuit Court of Appeals. The question is one which was bound to develop and come before these courts."

Mr. Alexander here cited famous habeas corpus cases in point. At the conclusion of the reading of one of these cases Judge Newman interrupted to remark:

"The question in this case is proper practice. It appears from the decision of the State Supreme Court that Frank could have and should have raised the Federal question in his motion for a new trial."

Judge Newman then read portions of Justice Lamar's and Justice Holmes's opinions in declining to certify Frank's application for a writ of error. He called attention to the fact that both of these Justices, and later the entire bench of the United States Supreme Court, held that it was for the States to determine the question of process and procedure.

"This ruling," commented Judge Newman, "involves a matter of State practice and presents no Federal question. It seems to me that question was determined by Justices Lamar and Holmes and by the entire bench of the United States Supreme Court. In the face of that, how can I issue a habeas corpus writ? That's the point on which I would like to hear from you."

## Entitled to Day in Court.

Judge Newman recessed court for five minutes. When court reconvened, Mr. Alexander resumed his argument. In replying to Judge Newman's question, he contended that, where a party has attempted to carry his case to the State courts and where he has been prevented through no fault of his own from securing consideration, he has the right to

obtain such consideration through a writ of habeas corpus.

"The fact that the United States Supreme Court says there is no Federal question before us," said Mr. Alexander, "gives this petitioner the right to have an adjudication of his Federal right, and if he has failed through no fault of his own he has the right to come into the Federal court and obtain a determination of his Federal rights."

"This man was cut off through error in his procedure. He is raising a Federal question in his appeal, but has never been able to get that question heard, and I say, your Honor, that he has the right in some way, in some court, to have his appeal heard."

"His attorneys, in the motion for a new trial, were experienced lawyers, well conversant with the procedure and practice in the State courts. When they failed to include this Federal question in the motion for a new trial they followed the practice and procedure which had been laid down by the courts for fifty years, and which had obtained without interruption. It is a recognized fact that the State Supreme Court can overturn all precedents and set up a new practice and procedure. This it did in the decision denying Frank's motion to set aside."

Mr. Alexander said the defendant had carefully and diligently followed the practice laid down by the highest courts of the State, and that when he omitted in his motion for a new trial to raise this Federal point he simply acted in conformity with previous decisions both of the State Court of Appeals and the State Supreme Court, which had held that the proper method was not to raise this point in the motion for a new trial, but to raise it in a motion to set aside the verdict.

Mr. Alexander further contended that, in view of the State Supreme Court's reversal of this long established procedure, the United States Supreme Court could not, would not, and did not consider the merit of the constitutional point, but only considered the question whether the State Supreme Court had the right to determine the question of procedure.

The latest addition to the formidable corps of lawyers defending Frank was Judge Lewis Shepherd of Chattanooga, who came to Atlanta today to work in behalf of the condemned man in the final effort to have the case transferred to the Federal courts. Judge Shepherd is one of the foremost constitutional experts in the South. As counsel for Ed. Johnson, whose death at the hands of a mob resulted in the citation of Capt. J. F. Shipp, Sheriff at the time of the lynching, before the United States Supreme Court, for contempt, he succeeded in having the negro's case transferred from the State to the Federal courts on the same ground as that on which Frank is making his plea.