

FRANK CASE TODAY IN HIGHEST COURT

Condemned Georgian's Counsel Seeks Leave to File Plea for Writ of Error.

LEGAL PRECEDENTS CITED

Louis Marshall, John F. McIntyre,
and C. P. Connolly Criticise
Trial in Atlanta.

Counsel for Leo M. Frank, who is under sentence of death for the murder of Mary Phagan, a factory worker, at Atlanta, Ga., last year, will ask the United States Supreme Court at noon today for leave to file a petition for a writ of error which, if it should be granted, would lead to a retrial of the case. Should this appeal fail the only recourse would be to the pardoning power of Gov. Slaton of Georgia. There will be no argument on the request for leave, but a brief will be filed, and should the court grant the leave arguments on the petition will be heard later.

The request already has been denied separately by Justices Lamar and Holmes, but the indications in Justice Holmes's memorandum that he doubted whether Frank had had an altogether unbiased trial have given rise to hope that with the whole case presented before the entire Supreme Court another opportunity may be given to prove the defendant's innocence.

Louis Marshall of counsel for Frank last night expressed confidence that his client would get an opportunity for another hearing and would be vindicated. "I came into the case only recently," he said, "not as a paid attorney, but solely because I was strongly impressed after careful consideration and analysis of the record that Frank was absolutely innocent, and that it was my duty to the profession to do all that was possible to prevent a miscarriage of justice. I feel that the more strongly because I am convinced Frank did not have a fair trial, and that when the trial Judge urged upon the counsel for the defendant that neither he nor they should be present at the rendition of the verdict by the jury because their lives thereby would be placed in jeopardy the court was coerced by fear of mob violence.

"This is a right which from the earliest times has been regarded both in England and in every State of the Union as fundamental, especially in capital cases. The withholding of that right, especially under the circumstances, deprived the trial of one of the essential elements of due process of law, and, in my judgment, the court lost jurisdiction over the prisoner the moment it took from him the opportunity to be heard during every instant of the proceedings. "Mr. Justice Holmes, in his memorandum, laid stress on the fact that the action of the mob deprived the trial of that prerequisite of fairness which lies at the foundation of due process of law. In the language of a Justice of the United States Supreme Court, 'in a capital case a man cannot waive and certainly will not be taken to waive without meaning it his fundamental constitutional rights; moreover, it cannot be imagined that the law will deny a prisoner the correction of a fatal error.'"

A case bearing out the contention that a man cannot waive his constitutional rights was pointed out yesterday by John F. McIntyre. In the case of the trial of a certain Cherumino for murder in an up-State city some forty years ago one of the jurors died in the course of the trial. The defendant himself and his counsel agreed to proceed with the case before the remaining eleven jurors, and the result was a conviction of murder in the first degree. The matter then was carried to the Court of Appeals, which reversed the case on the ground that the defendant, notwithstanding his personal agreement, could not waive his constitutional rights to trial by a jury of twelve men.

"They say the appeal was too late," said Mr. McIntyre. "Where a constitutional question is raised an appeal can never be made too late, and in this trial there is involved the most serious constitutional question that can be presented—the fairness of the trial and the right of the defendant to be present at all times. The trial was a farce. I never read of a trial which contained so many glaring errors and so many instances of unfairness, and, I may say, a bias having to my mind its basis in racial prejudice.

"If Frank had been a Christian or Gentile he never would have been convicted on Conley's testimony. He was convicted, I think, on account of race prejudice; yet the Constitution of the United States and of every State guarantees an accused man a fair and impartial trial. Thus it is a constitutional question.

"Upon review of the record by the Supreme Court, it will be found that a manifest unfairness characterized every day's proceedings. Demonstrations of approval for the prosecution and disapproval for the defense were allowed in the courtroom and outside its doors, within the sight and hearing of the jury."

Mr. McIntyre also recalled an incident in the career of Judge Ben H. Hill, who refused the defense's appeal for a new trial in the Georgia courts.

"Judge Hill," said Mr. McIntyre, "must have been willing to accept the testimony of the negro Conley if he refused Frank another hearing. Now this same Ben H. Hill came to New York—in 1893, I believe it was—as counsel for a Southern woman, Fay Moore, who with her husband was under indictment for operating a badger game against Martin Mahon. I prosecuted and convicted them both; and in proving one of the minor connecting links of the case I used the testimony of a negro. Mr. Hill, in summing up to the jury, said: 'Out of a long familiarity

with the negro type and knowledge of the race, I tell you on my honor as a Southern gentleman that a negro cannot be believed under any circumstances."

A case where questions of pure technicality had been thrown aside in order to give a man apparently unjustly convicted another chance was recalled by C. P. Connolly of Collier's Weekly, who cited the instance of Salvador Pagano, who was arraigned on a charge of murder in Tacoma in 1892. Pagano was convicted on circumstantial evidence which Mr. Connolly characterized as the flimsiest.

"Furthermore," Mr. Connolly added, "there was in this case also the question of race prejudice; Pagano was a foreigner, belonging to a race believed to be vindictive, and feeling was high. An appeal for a new trial was filed, but a day or so after the expiration of the legal limit for such action; and it was explained by his attorney that because Pagano was poor he was unable to raise money to press his application in time. Nevertheless the Supreme Court refused the motion and decided that he must hang.

"Then sentiment changed. Additional evidence was discovered which pointed to another man as the guilty person. Everybody then wanted to do something. The Legislature was in session, and hastily passed a clumsily drawn law to fit the case. But the Supreme Court did not rely on this altogether; being human, it allowed the lawyers to get together and agree to waive all technicalities. The case was resubmitted to the Supreme Court—irregularly but resubmitted none the less—and the court handed down an opinion that it would do any man good to read. A new trial was granted on the very same record on which it previously had been decided to let Pagano hang. The court decided that the time within which an appeal may be perfected is jurisdictional; it was spurred to a realization that human life and liberty and not red tape is at the bottom of civilization.

"No lawyer on earth could have kept his head altogether in such a crisis as that at Atlanta. If Frank's lawyers then made a purely technical error is it possible that the courts would hold a man's life responsible for it? Furthermore, Frank is a citizen of the United States as well as of the State of Georgia. Justice Holmes in his memorandum indicated the opinion that Frank did not have a trial according to constitutional guarantees. Laying aside every other consideration, when the Federal courts really think there is reason for such an opinion, there ought to be some redress; if there seems ground for believing that Leo M. Frank, a citizen of the State of Georgia, cannot get justice in his own State, then the Federal courts ought to take what steps they can to see that a fair trial is given to Leo M. Frank, citizen of the United States."