Leo M. Frank's New Fight for Life May Last in Courts for Six Months Before a Final Decision Is Reached

If Prisoner Wins, the Case Comes Back to the Federal Court for Hearing on Constitutional Questions; If He Loses, His Court Battle Is Over.

BOTH SIDES HAVE RIGHT TO MAKE APPEAL AGAIN WHEN NEWMAN DECIDES

When Case Goes to the Supreme Court for Second Time, the Decision Will Be Final—Supreme Court Hearing on Habeas Corpus Writ Is Expected Within Sixty Days.

If the supreme court grants the appeal of Leo M. Frank from the denial of the writ of habeas corpus submitted to Judge Newman, which was certified yesterday by Justice Lamar, of the supreme bench, a long and tedious fight will again be launched for the life of the doomed man—this time in the federal courts.

Justice Lamar gave his certificate to the appeal Monday morning. The case has now become a part of the calendar of the nation's highest tribunal, and it is anticipated will be argued within two months or less. This action of the supreme court justice has created widespread speculation and interest among the thousands who have followed the legal ramifications of the Frank case.

Before Newman Again.

In event the supreme court upholds the denial of Judge Newman, the case will be ended so far as the courts are concerned. If, however, Judge Newman's verdict is reversed, the case will again be sent before him, this time for presentation of proof of the allegations made in the motion for habeas corpus proceedings.

In short, if Judge Newman is reversed he must hear the evidence of both sides in substantiation and rebuttal of the allegations made by the defense in the habeas corpus hearing. If Judge Newman, in this case, decides adversely to Frank his attorneys have the right to appeal again to the United States supreme court.

If decided in favor of Frank, the prosecution has the right for appeal. In each instance, however, the certificate of Judge Newman must be appended to the appeal, just as is the case in appeals to the state supreme court from superior court.

Much speculation ensued over the attitude of the prosecution if the federal courts eventually decided to free Frank. It was the consensus of legal opinion, however, that the plea of "former jeopardy" would forestall all probability of a second indictment.

Expects Case Expedited.

Lawyers for Frank state that they expect the hearing on constitutional questions to be expedited as much as possible. Leonard Haas stated that he believed the hearing before the supreme court on the habeas corpus writ would be held within sixty days, possibly as early as thirty days. If Frank wins there and the case is sent back to the federal courts, heard there, and finally returned to the supreme court for a final decision, he believes that this final decision will be rendered within six months from the present date.

Louis Marshall, who presented the last appeal to Justice Lamar, who certified the appeal to the supreme court, said that he expected an early hearing. If the case followed the usual course it would take a year before it reached the full bench, he said, but he was of the opinion that the appeal would be advanced upon the docket, so that it would get an early hearing.

It was stated last night by Harry A. Alexander, associate counsel for Frank and a leader in the supreme court battle, that the defense would, in all probability, not oppose a move on the part of the state to advance the case on the United States docket.

Will Ask Early Hearing.

Solicitor Dorsey sought to confer with Attorney General Warren Grice at the latter's home in Hawkinsville Monday afternoon when news reached him of the Justice Lamar decision. The attorney general was on a fishing trip. Mr. Dorsey will communicate with him today and arrange for an early consultation in regard to combating the Frank fight in Washington.

"Although I am unable to say anything definite until I have conferred with Mr. Grice," Mr. Dorsey stated last night. "I think that the prosecution will request the supreme court to advance the Frank appeal on their docket so that an early hearing might be had. I have no donbt but that the prosecution will follow these lines."

Beyond this the solicitor would have nothing to say.

Frank's appeal was made upon the action of Judge W. T. Newman, of the federal court of the Atlanta circuit, who declined to grant the habeas corpus writ presented by Frank's defense last Saturday week.

Say State Lost Jurisdiction.

The basis of the argument of Frank attorneys is laid on the allegation that the Georgia courts lost jurisdiction over him when they permitted his attorneys to waive his presence in the courtroom at the time of the verdict, which action, the defense contends was unconstitutional and illegal.

The attitude of the crowds present in the courtroom is another allegation made by the defense on which they declare Frank is being held without due process of law.

The evidence that will be submitted before Judge Newman in case the supreme court reverses his decision and sends the Frank case back into his tribunal, will be the same line of evidence that was heard before Judge Ben

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LEO FRANK'S NEW FIGHT MAY LAST SIX MONTHS

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Hill when the constitutional motion to upset the verdict was first brought into the courts.

A Step to Freedom.

Frank's attorneys express renewed hope over this new turn. He, himself, declared that it meant the primary steps to freedom.

"I am confident of it," he said. "Right will triumph in the long run. People and the courts are waking to the tragedy of the wrong that has been committed. I feel assured that when the supreme court reviews my case it will readily see the error and set about at once to rectify it before it is too late.

"I have received an enormous mass of letters from persons everywhere, assuring me of their belief in my innocence. It is only a question of time until I feel that complete exoneration will come."

Judge Lamar's Statement.

Justice Lamar's statement in full follows: .

"Leo Frank's recent application for a writ of error was denied by me on the ground that no federal question was involved in the ruling of the supreme court of Georgia that his motion to set aside the verdict finding him guilty of murder had been filed too late. This petition presents a wholly different question, since it is an application for the allowance of an appeal from the judgment of a federal court on a record which presents a purely federal question, irrespective of regulations governing state practice.

"Frank's petition for the writ of habeas corpus, addressed to the judge of the United States district court for the northern district of Georgia, alleges that on his trial for murder in the superior court of Fulton county, Georgia, public feeling against him was so great that the presiding judge advised his counsel not to have him present in the courtroom when the verdict was returned, and that his involuntary absence, under such circumstances, when the verdict was returned, deprived him of a hearing to which he was entitled under the constitution and rendered his conviction void. He avers that his motion for a new trial was overruled and he then moved to set aside the verdict as being void for want of jurisdiction; that in passing on that motion the state supreme court held that while he had the constitutional right to be present when the verdict against him was returned into court, yet such verdict could not be attacked, by a motion to set aside, after the expiration of the trial term and after his motion for a new trial had been finally refused. He alleges that his attempt to have that judgment reviewed in the supreme court of the United States failed because, though a federal question was raised in the record, the decision of the supreme court of Georgia was based on a matter of state practice.

Habeas Corpus Claims.

"He, therefore, filed this petition for a writ of habeas corpus in which he claims that the right to be present at the rendition of the verdict was jurisdictional and that on habeas corpus he is entitled to a hearing on the question as to whether he had waived or could waive his constitutional right to be present when the verdict of guilty was returned into court.

"The district judge heard no evidence as to the truth of the allegations, but refused the writ on the ground that the facts therein stated did not entitle Frank to the benefit of that remedy. He declined to give the certificate of probable cause, and this application for that certificate and for the allowance of an appeal was then made to me as the justice assigned to the fifth circuit.

"Under the act of 1908 the application for the certificate is not to be determined by any views which may be held as to the effect of the final judgment of the state supreme court refusing a new trial, but by considering whether the nature of the constitutional right asserted and the absence of any decision expressly foreclosing the right to an appeal, leaves the matter so far unsettled as to constitute probably cause justifying the allowance of the appeal.

"The supreme court of the United States has never determined whether, on a trial for murder in a state court, the due process clause of the federal constitution guarantees the defendant a right to be present when the verdict is rendered.

Point Not Decided.

"Neither has it decided the effect of a final judgment refusing a new trial in a case where the defendant did not make the fact of his absence when the verdict was returned a ground of the motion, nor claim that the rendition of the verdict in his absence was the denial of a right guaranteed by the federal constitution.

"Nor has it passed upon the effect of its own refusal to grant a writ of error in a case where an alleged jurisdictional question was presented in a motion filed at a time not authorized by the practice of the state where the trial took place. Such questions are all involved in the present case, and since they have never been settled by any authoritative ruling by the full court, it cannot be said that there is such a want of probable cause as to warrant the refusal of an appeal. That being true, the act of congress requires that the certificate should be given and the appeal allowed."

Second Time Before Lamar.

This was the second time Frank's fate has rested in Justice Lamar's hands. After the Georgia supreme court had declined to set aside the verdict of conviction, Justice Lamar was asked to issue a writ of error for the supreme court to review the case. He declined on the ground that no federal question was presented, inasmuch as questions of procedure were for the states to decide. Justice Holmes and eventually the entire court pursued the same course.

Application was then made in the Georgia federal court for Frank's release on a writ of habeas corpus. Judge Newman held Frank was not entitled to the writ, and refused to grant an appeal to the supreme court, because he was unwilling to issue a certificate of "probable cause," as required in such appeals by a federal statute of 1908. Justice Lamar was then asked to grant the appeal and issue the certificate. He found that several questions of federal law, unsettled by the supreme court, existed in the case and hence gave rise to "probable cause" for the appeal. These were whether the federal constitution requires an accused to be present when a verdict is returned against him in a state court; the effect of the accused not raising the point of his absence on a motion for a new trial, and the effect of the supreme court's own action in refusing to grant the writ of error in a case where an alleged jurisdictional question was presented in a motion filed at a time not authorized by the practice of the state where the trial took place.

Puts Case on Docket.

Justice Lamar's action is only the signing of the certificate which Judge Newman declined to do. It puts the Frank case on the docket of the supreme court. Now, it must be argued before that tribunal. It will then be decided by the supreme court—for the first time as a whole—whether or not a defendant has the right to waive his presence during course of his trial.

Although Judge Lamar had refused to grant the first appeal submitted by Frank on the ground that no federal question was involved—deciding that the supreme court of Georgia, by right of state practice, had determined this—he now grants the appeal because the new appeal concerns the action of a federal judge.

Supreme Court to Decide.

By John Corrigan, Jr.

Washington, December 28.—(Special.) Whether Leo Frank, of Atlanta, Ga., convicted of Mary Phagan's murder, the Atlanta factory girl, must pay the death penalty, will be finally determined by the supreme court itself.

Associate Justice Joseph R. Lamar today granted an appeal certifying that there is "probable cause" as to why the Frank case should be reviewed in full by the supreme court.

This will act as a stay of execution, which had been set for January 22, until the supreme court has determined whether Frank's constitutional rights were infringed by his being absent from the courtroom when the jury in the trial court returned a verdict of guilty.

Justice Lamar stated that several constitutional questions were raised in the Frank case which had never hitherto been settled by a decision of the supreme court, and it was necessary that they should be finally adjudicated. Therefore he allowed the appeal. It is believed here he acted only after consulting other justices.

At the same time he notified Louis Marshall, counsel for Frank, of granting the appeal, he telegraphed the jailor at Atlanta notifying him that Frank is now, technically at least, in the custody of the supreme court.

It is probable that as soon as Justice Lamar has filled out the certificate of probable cause it will be forwarded by counsel for Frank to the United States district court of northern Georgia, which recently refused to grant a certificate of probable cause of the review of the case under act of congress of 1908, which controls the review by the supreme court of cases originating in state courts.

Counsel for the state may move to advance the case for an early hearing on its merits. The return under the certificate must be made in thirty days if the supreme court rules are adhered to, but practically everything will depend on the part of counsel for both sides.

With proper facilitation the case would be disposed of by the supreme court before adjournment in June. On the other hand, it might remain undecided for two years.

Early Hearing Expected.

New York, December 28.—(Special.) "Justice Lamar's decision simply means that Leo Frank gets the hearing that he had previously been denied," said Louis Marshall, tonight, whose efforts won for Frank the right to have the constitutional questions raised by the prisoner passed upon by the highest court in the land, the questions having been dismissed on the first appearance of the case before that body on a technicality. "I presume," said Mr. Marshall, who was inundated with messages of congratulation, "that the case will be expedited and come up for argument some time in January. Presumably the Georgia authorities will wish an early argument. Ordinarily more than a year would elapse before the case got to the full bench if it followed the usual course, but in such cases the practice is to advance the matter on the docket so as to afford an early hearing. "I am not under retainer to Frank or any one else. I took the matter up purely as a matter of professional duty, when Frank's Georgia lawyers came and, after getting my opinion on the case, asked that I take charge of the fight before the supreme court. I accepted as a matter of duty.

"Really there has been a great deal of misunderstanding about the case. Frank is not and never was a wealthy man. Neither is his family wealthy. They are people in very moderate means.

"It is extremely important that the questions which have been raised should be determined once and for all. We will be ready whenever our day in court comes."

WITH APPEAL PENDING, ZIONISTS WOULDN'T ACT

Fort Worth, Texas, December 28.—Texas Zionists, holding their annual meeting here today, declined action on a resolution of protest against the execution of Leo M. Frank, offered by Vice President I. N. Mehl. He withdrew it when other members advised against it because the appeal is again pending in the supreme court of the United States.