CASE OF LEO FRANK IS UP TO GOVERNOR FOR FINAL DECISION

Slaton Now Becomes Judge and Jury in Famous Case Which Has Been in Courts Over Two Years.

FRANK STILL HOPEFUL OF SECURING FREEDOM

Lawyers for Prisoner and Solicitor Dorsey Will Appear Before Governor Slaton at 10 O'Clock Today.

The action of the board of pardons yesterday in refusing, by a vote of two to one, to recommend executive clemency in the case of Leo Frank, leaves but one authority between the condemned man and the execution of the court's order for the death penalty—and that authority is the governor of Georgia.

Regardless of the recommendation of the board of pardons Governor Slaton's voice is the final authority, for even if the board of pardons had recommended clemencey it would have been within the power of the governor to have acted according to his own judgment—just as it is now within his power to act regardless of the refusal of the board to recommend mercy.

Up to the Governor.

In other words, Governor Slaton now becomes the final authority of the case and, as judge and jury, he must within the next few days decide the fate of Leo Frank. By authority of law he can either reprieve, commute or pardon. If he refuses to interfere with the verdict of the courts and accepts the action of the board of pardons Leo Frank's last chance will be gone.

Counsel for Frank, which includes Harry Alexander and William M. Howard, and Solicitor Hugh M. Dorsey will appear before Governor Slaton this morning at 10 o'clock preliminary to the final hearing before the state executive.

There is a possibility that the hearing will proceed at this time. Counsel for the defense is prepared, and will request that they be permitted to submit their argument without further delay.

Although he was unable to speak definitely last night, Governor Slaton stated that it was possible that their request in this respect would be granted. Solicitor Dorsey, however, is likely to dissent.

"I will not be ready to argue tomorrow," was his statement last night. Whether or not he would be prepared by Friday or Saturday, he would not say, asserting that he would prefer not to be further quoted.

Howard Makes Statement.

Attorney W. M. Howard, who led the fight before the prison commission, issued a statement last night in which he said that the position of Frank's counsel would continue as it was before the commission, "that the record does not show that the doomed man is guilty, but, to the contrary, that he is innocent."

"While not criticising any member of the prison commission," he said, "the report of the majority deals solely with negatives; it says only that none of the jurors, the solicitor general nor anyone connected with the prosecution of the case has asked for commutation of the sentence. It does not go into what the law contemplates in application for executive clemency. The dissenting opinion by Mr. Patterson is an expression from a legal mind on an analysis of the record.

"We will go before the governor tomorrow morning and present our application to him. Our position will be, as it has been, that the record does not show that this man is guilty; that the record shows he is innocent. We hope to present this to the governor's legally trained mind."

Frank Still Hopeful.

Although he was visibly affected by this blow, Leo Frank, in his cell at the Tower, declared to the first newspaper man he admitted during the day that he was still unshaken and that he believed, even yet, that his life would be spared.

"I have the confidence of an innocent conscience," he declared to The Constitution man, "and, somehow, I can't reconcile myself to believe that the

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LEO FRANK'S CASE GOES TO GOVERNOR

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courts will hang a man not only innocent, but so obviously innocent.

"You will always find me confident, and I faithfully believe that, even though it waits until the last moment, vindication will come."

Frank was visited by but few friends during the day, at his own request. Many called at the jail, but were declined admission.

When The Constitution man appeared he was sitting within the barred cage. His mother, Mrs. Rea Frank, sat just outside, knitting. She showed visible signs of worry and grief, and loss of sleep. Frank was cordial in his greeting, accepted the newspapers with thanks, and declared that he would have no statement of any length, except to say that he continued confident of final vindication.

Minority Report.

There was one dissenting opinion in the prison board's report on the hearing. It was that of T. E. Patterson. The commissioners opposing commutation were Chairman R. E. Davison and Commissioner E. L. Rainey.

The report of the majority follows:

"To His Excellency the Governor—Sir: The prison commission have had under consideration an application for executive clemency in behalf of Leo M. Frank, who, at the July term, 1913, of the superior court of Fulton county, was convicted of murder and sentenced to hang, and beg leave to report that they declined to recommend clemency.

"R. E. DAVISON, Chairman;
"E. L. RAINEY, Commissioner."

"None of the grand jurors who found the indictment; none of the trial jurors who heard all the evidence under oath, nor the prosecuting attorneys have asked that the sentence be commuted. The judge who presided at the trial and had the right to exercise the discretion of fixing the penalty at either life imprisonment or death, imposed the latter sentence and overruled a motion for a new trial.

"Several appeals were taken to the appellate court of the United States (all of which were denied and the judgment of the lower courts affirmed), thus assuring the defendant of his legal and constitutional rights under the laws of the land.

"It further appears that there has been no technical proposition of law or of procedure that has prevented the petitioner from having his guilt or innocence passed upon by a jury of his peers and by the highest constituted appellate authorities, and no new evidence of facts bearing upon his guilt or innocence having been shown, we see no reasons for taking this case out of the ordinary rules of law and justice, and feel constrained not to interfere with the enforcement of the orderly judgment of the courts.

(Signed) "R. E. DAVISON.
"E. L. RAINEY."

Regarding the dissenting opinion of Commissioner Patterson, Attorney Harry Alexander said in the only statement issued by the defense Wednesday that "the doubt of the lone commissioner served to accentuate the horrible doubt that exists in the Frank case."

Patterson's Opinion.

The minority opinion follows:

In re Leo M. Frank, sentenced to be hanged—Application for executive clemency.—Memorandum of recommendation by T. E. Patterson, Prison Commissioner.

"For some time prior to April 26, 1913, Leo M. Frank was superintendent of the manufacturing plant of the National Pencil company, situated on South Forsyth street, in the city of Atlanta, Ga., and Mary Phagan, a young girl scarcely 14 years old, was an operative in said factory.

"During the week ending April 26, 1913, having worked only one day, she had earned $1.20. On this date, about noon, she went to the factory building for the purpose of drawing her pay. She went into the office of Leo M. Frank and the next time she was seen her dead body was found in the basement of the factory about 3 o'clock on the next morning by Newt Lee, the night watchman.

"Frank was indicted for her murder and a negro by the name of Jim Conley was indicted as an accessory after the fact. On the trial of Leo M. Frank he was convicted without a recommendation, and was sentenced to be hanged. He made a motion for a new trial, which was denied by Hon. L. S. Roan, the trial judge, and this judgment was affirmed by the supreme court.

Juries Judges of Facts.

"That a young girl should go into a manufacturing plant where she had been employed, in the heart of a great city, for the purpose of drawing her pay and there be murdered and possibly maltreated in other ways, and no one seeming to know anything concerning the crime, which was such an atrocious one, makes a case where the verdict of the jury and the sentence of the court should not be disturbed except for very grave reasons.

"Under our laws, the juries are the judges of the facts, with only the limitation that the trial judge in the exercise of a sound discretion may, if he is not satisfied with the finding of the jury, grant a new trial. The only review that the supreme court has over trials is for the correction of errors of law. They can only interfere with the verdicts of the juries on the facts when they can say as a matter of law there was not sufficient evidence on which to base the verdict. The right of trial by jury, guaranteed under our constitution, is so sacred that I have always felt that the verdicts of the juries should be upheld and not disturbed unless there was something inherent in the record to indicate that a mistake had probably been made, or there is some development after the trial, or some facts become known that the jury did not have the benefit of to warrant the inference that a different verdict might have been reached had these facts been known at the time of the rendition of the verdict. Therefore, in approaching this case I do so in view of those principles.

Little New Light.

"There has nothing developed since the trial of this case that throws much more light upon the transaction than the jury had at the time of the rendition of their verdict. Therefore, I think that there is nothing of that kind in this case on which to base a commutation of this sentence.

"The question then left for consideration is, is there anything inherent in this record to indicate that there was a possibility of a mistake by the court and jury and would, therefore, warrant the governor in exercising the right to impose the penalty of life imprisonment instead of the extreme penalty of death, a right the jury had in the case, and this being a case based on circumstantial evidence, the judge had in the absence of a recommendation by the jury.

"In examining the evidence in this case, as I have done carefully, having read the printed record several times, I could agree with many eminent lawyers and jurists of Georgia, some of them connected with the firms engaged in the prosecution of the case, that the very nature of the evidence against Leo M. Frank was such as upon the consideration of it the mind is left in a state of uncertainty as to whether or not there is room to doubt the story told by Conley, inconsistent and contradictory as it was in the telling of it in different portions and contradicted by his own affidavits made previous to the trial and by other testimony on the trial.

Equal Opportunity for Motive.

"If we take the evidence of the case outside of that of Conley and Leo M. Frank, we find that both Frank and Conley had equal opportunity and motive for committing the crime, with the possible added motive of robbery on the part of Conley; that Conley wrote the note found by the body; that Conley made several conflicting affidavits as to his connection with the crime, and that Conley in making these statements was trying to protect himself, as is inferred from the following taken from his testimony (page 67 of printed testimony) that 'as to why I didn't put myself there on Saturday, the blame would be put on me.'

"This shows that Conley was thinking about protecting himself and not Frank. These circumstances and evidence fix the crime on Conley unless he is able to explain them. This he attempts to do in such a way as to make Frank guilty as principal and himself guilty as an accomplice. Thus we have Frank, who protests his own innocence of participation or knowledge of the crime, convicted on the testimony of an accomplice, when the known circumstances of the crime tend most strongly to fix the guilt upon the accomplice.

Conley Protects Self.

"The accomplice has the highest motive for placing primary responsibility on Frank—that of self-protection—which is shown to have been in his mind when testifying.

"However, there are other reasons inherent in the record that would justify and authorize the exercise by the governor the right of commutation in this case. The trial judge who passed upon the motion for a new trial, who heard the testimony of Conley and the other witnesses, who saw Conley on the stand, observed his demeanor when testifying, and who had a trained and experienced mind in observing and weighing these matters, says in a letter which he authorized to be used in this hearing, concerning Conley's testimony, as follows: 'After months of continued deliberation, I am still uncertain of Frank's guilt. This state of uncertainty is largely due to the character of the negro Conley's testimony, by which the verdict was evidently reached.'

"It can not be said that this was wrung out of Judge Roan while sick, for he orally expressed practically the same uncertainty when passing upon the motion for a new trial.

"Also, there is the dissenting opinion of two judges of our supreme court, Chief Justice Fish and Justice Beck, in which they use the following language in discussing the effect of certain testimony of this negro Conley and other witnesses upon the minds of the jury, which, they consider, was inadmissible: 'The admission of the evidence in relation to them (certain prior acts of lasciviousness) was certainly calculated to prejudice the defendant in the minds of the jurors, and thereby deprive him of a fair trial.'

Position of Trial Judge.

"In the language of the supreme court this case depends largely upon circumstantial evidence, if not altogether. In my investigation, I can not find where the executive has allowed a man hanged when the trial judge was not satisfied as to his guilt. Some have been allowed to be hanged when the trial judge recommended commutation, but this was in cases where it was simply a question of what punishment should be meted out where the perpetrator of the crime was known.

"The sentence of Dewberry in Atlanta was not disturbed where the judge was not in doubt, but the solicitor general expressed a doubt as to the identity of the accused. But, as above stated, I don't find in any case founded on circumstantial evidence, such as the instant case, where a man has been allowed to be hanged where the trial judge was not satisfied as to his guilt and so communicated to the governor.

"In the John Wright case, from Fannin county, a most atrocious murder, the sentence was commuted on the recommendation of the trial judge and the solicitor general on the ground that the main witness for the state at a preliminary investigation had failed to identify Wright as the murderer, and that fact left a doubt in the minds of the judge and solicitor as to the identity of the accused.

"In the instant case we not only have the trial judge expressing a doubt as to the guilt of the accused, but he states that this doubt arises from the character of the testimony of the state's main witness, who was charged with being an accomplice and who had equal opportunity and motive for the crime. In addition to this state of uncertainty in the mind of the trial judge, we have the fact that two justices of our supreme court say that in their opinion this applicant has been denied a fair trial.

"In view of these facts in the record, besides others that might be mentioned, I am persuaded that the governor is authorized to, and should, commute the sentence of Leo M. Frank to life imprisonment, especially as this does not disturb the verdict in the case found by the jury, but only substitute one penalty that is prescribed by law for murder, that of life imprisonment, for the extreme penalty of death, either of which satisfies the law and the verdict of the jury, this being a case founded upon circumstantial evidence.

"Respectfully submitted.
"T. E. PATTERSON."