

MARSHALL HEARD

IN FRANK'S BEHALF

Mob Spirit and Defendant's Absence at Verdict Presented in Appeal to Supreme Court.

QUESTIONED BY JUSTICES

Court Plainly Interested in Allegations of Denial of Due Process of Law—Continue Arguments Today.

Special to The New York Times.

WASHINGTON, Feb. 25.—The Supreme Court of the United States today heard counsel for Leo M. Frank, under sentence of death for the murder of a factory girl in Atlanta in 1913, on his appeal from the denial by the Federal District Court of Georgia of his petition for a writ of habeas corpus. Louis Marshall, of counsel for Frank, got about half way through his argument today, and it is expected that argument both for Frank and for the State of Georgia will end not later than Saturday. The court's decision probably will not be handed down for some time. A considerable portion of the hearing today was taken up in reading the brief presented in Frank's behalf which already has been summarized in THE NEW YORK TIMES.

The Supreme Court already has declined to review the case on a writ of error. In announcing its denial of the petition the court handed down no opinion setting forth its position on the various points at issue. This silence in the earlier proceeding gave added interest to questions propounded to Mr. Marshall today by the Chief Justice and several of the Associate Justices.

Mr. Marshall discussed only two points today, the right of the accused to be present throughout the trial, particularly when the verdict was rendered, and the mob spirit alleged to have been manifested many times throughout the trial by the populace within and without the courtroom. On both points he was closely questioned, particularly by Chief Justice White and Justice Pitney.

Frank "Coerced" by Court.

Mr. Marshall's statement that Judge Roan of the trial court "coerced" Frank into being absent when the verdict was rendered was questioned by Chief Justice White. The attorney insisted, however, that the suggestion by the Judge that Frank's life and limb and those of his counsel might be in danger if they attended amounted to coercion. He argued that the right of the accused to be present could not be denied.

"We have held that a court may abolish a trial by jury, and I do not see why a State may not abolish one of the incidents to a jury trial," interrupted Justice Pitney. "The decisions you cite refer to Federal cases."

Mr. Marshall replied that it was a question of due process of law, and that while the Fifth Amendment to the Constitution guaranteed due process in Federal cases, the guarantee of due process in State cases in the Fourteenth Amendment was the same in effect.

When the point of mob violence was taken up, Justice Holmes remarked: "I am free to confess that point is one that impresses me very much."

"This Court has said that there must be a trial before a competent tribunal," began Mr. Marshall. "A competent tribunal is one that holds the scales of justice impartially, that is not swayed by fear or favor. Here the trial was marked by prejudice and hostility. Jeers at counsel for Frank were permitted when they lost a point. The crowd almost trespassed upon the jury box, hanging over the jury box, and their whispers were heard throughout the courtroom. Applause greeted the Solicitor General when he appeared at the seat of justice, and then the Judge held a conference, in the presence of the jury, with the Chief of Police and a commanding officer of the State Militia."

"That was a demonstration that probably has no parallel in the history of trials. Finally, the Court asked counsel to meet him in private conference, and then, upon the insistence of the Court that the prisoner might be torn from the sanctuary of the court and lynched by a mob if he was present when the verdict was returned, counsel consented to his being absent. The jury was left to return its verdict to the prosecuting officer and the mob. They knew what that meant."

Justice Pitney inquired if the State Supreme Court had not passed upon all these facts, whereupon Justice Holmes asked if Mr. Marshall did not mean that if these were the facts it did not matter if twenty courts had passed upon them. The attorney signified his acquiescence.

The Right to Be Heard.

Several Justices expressed surprise that the allegations of mob violence, which Mr. Marshall dwelt upon with great earnestness, were not set forth in more detail in the record of the case. The Chief Justice and Justice Pitney questioned Mr. Marshall in some detail as to whether the absence of the accused from the courtroom when the verdict was rendered was actually a denial of the right to be heard, when he had been in the courtroom throughout the prolonged trial, had taken the stand in his own defense, and had been heard at length.

"The right to be present is a constitutional right," said Mr. Marshall. "It is part of the right to be heard. It would not have been proper to let Frank flit in and out of the courtroom, make an occasional statement, and then return to jail, as if he were not a reality but a mere abstraction."

Chief Justice White interrupted to ask: "Is it your argument that in a jury trial where the accused is not present he has not been heard and the trial has been illegal and he must go free?"

"The right to be heard," said Mr. Marshall, "includes the right to be present at the final stages of the trial as well as the earlier stages."

Chief Justice White asked Mr. Marshall to point out a passage in the Federal Constitution guaranteeing that right.

"When you say 'the right to be heard' you take into account both the question and the argument," said Chief Justice White. "The question is: What is the right to be heard?"

"The question involved here is: What is the right to be heard as applicable to a criminal trial?" replied Mr. Marshall. "Unless the right to be present is a part of the right to be heard, the court might say to a defendant at any stage: 'I do not want you to be present any further. We can proceed with this trial without you.' Certainly a Legislature cannot say a trial can go on without the presence of the accused, or that he can be present at some stages and not at other stages."

The Chief Justice questioned Mr. Marshall regarding the fact that Frank actually was heard at length, that he testified in his own behalf, and was present in the court except when the verdict was rendered. The Chief Justice seemed to take the position that the due process of law guaranteed by the Constitution did not involve all the common law practices regarding a trial by jury. He referred to the fact that in Louisiana, his native State, where the Roman civil law prevails, the common law practice does not, and that juries give majority instead of unanimous verdicts. He asked Mr. Marshall if he thought that practice invalidated all jury verdicts in Louisiana, and Mr. Marshall replied that he did not think the common law applied there.

After Mr. Marshall had described the incidents illustrating the mob spirit that pervaded the court room, both the Chief Justice and Justice Pitney asked him if these facts were uncontested and whether they had been laid before the Supreme Court of Georgia when the trial in the lower court was sustained.

Mr. Marshall replied that some of the facts had been laid before the Supreme Court of Georgia, but that the rulings on procedure prevented a full discussion of those aspects of the trial.

Justice Hughes asked if these statements of fact had not been denied, and Justice Pitney said that the record seemed to show that the Supreme Court of Georgia had decided the questions before it simply on technical grounds. Mr. Marshall said that Frank's counsel had misapprehended the procedure in the earlier stages of the appeals, so that there was no way by which the record could disclose the facts as to mob violence.

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