form but substance," expressed the opinion

> that if one juryman yielded to the reasonable doubt that he himself later expressed in court as the result of most anxious deliberation, neither prisoner nor counsel could be safe from the rage of the crowd.

From this Justice HOLMES concludes that the presumption is "overwhelming that the jury responded to the "passions of the mob." It is his opinion that upon allegations of this gravity the case ought to be heard, "whatever the decision of the State court "may have been." He continues:

> It may be, on a hearing, a different complexion would be given to the Judge's alleged request and expression of fear. But supposing the alleged facts to be true, we are of the opinion if they were before the Supreme Court it sanctioned a situation upon which the courts of the United States should act, and if for any reason they were not before the Supreme Court it is our duty to act upon them now and to declare lynch law as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death.

Justice HOLMES's dissenting opinion, in which Justice HUGHES concurs, it seems to us, does look through the form to the very substance of the allegation that FRANK never had a fair trial. The court decides otherwise by a majority opinion, it sustains the sacred procedure of the Georgia courts as conclusive and binding. It is a decision that forestalls further inquiry into the merits of the case, apparently removes the last chance for a new trial, and leaves the question of FRANK's guilt and his death sentence resting upon the verdict in a trial which the Judge upon the Bench said had not convinced his own mind, and which was very far from bringing conviction to the public mind. The Georgia courts found the allegations of disorder and mob tyranny to be "groundless." There was, as we have said, great excitement over the case in Georgia, and public opinion ran all one way. Justice HOLMES observes that any Judge who has sat with juries knows that "in spite of forms "they are distinctly likely to be im"pregnated by the environing atmos"phere." Is it safe to assume that courts subject to the influences of that environment will be quite unaffected by them? It seems to us that there are elements of danger in a decision that proclaims the regularity of procedure in a capital case without a somewhat more searching examination into the heart and substance of the conditions upon which the appeal is based.

FRANK's only hope now apparently is from Executive clemency. Public excitement in Georgia has been allayed by the lapse of time. There are indications that many opinions have been changed as to the sufficiency of the evidence on which conviction was brought, and it is extremely probable that commutation of the sentence or pardon of the prisoner would be welcomed by a great part of the people of Georgia as an escape from the perpetration of an act of injustice which, in the opinion of many, would put a stain upon the reputation of the State. The persistence of reasonable doubts as to the guilt of the prisoner and the fairness of his trial furnishes ample want for Executive interference.

THE DISMISSAL OF FRANK'S APPEAL.

In dismissing the appeal of LEO M. FRANK, now under death sentence in Atlanta, from the decision of the Federal court in Georgia refusing him a writ of habeas corpus, the Supreme Court declares in an opinion written by Justice PITNEY that it was the duty of the court "to look through the "form and into the very heart and "substance of the averment in FRANK's "petition," and into the trial proceedings of the State court of Georgia. The opinion then proceeds to review the allegations upon which the appeal was based, particularly the charge that a fair trial with an impartial verdict was impossible at the time FRANK was found guilty because of the excited state of feeling in Atlanta and disorder in and about the courtroom. Justice PITNEY points out that these allegations of disorder were submitted to the trial court and afterward to the Supreme Court. The facts were examined and the allegations found to be groundless. As to the contention that FRANK's rights were forfeited because he was absent from the courtroom at the time the verdict was rendered, the court finds that the presence of the prisoner at the time the jury rendered its finding is not so essential a part of the hearing that a waiver of the right, even when made by counsel without the knowledge of the prisoner, "amounts to a deprivation of due process of law." Then Justice PITNEY states this conclusion:

> In all the proceedings in the courts of Georgia the fullest right and opportunity to be heard according to the established modes of procedure have been accorded to him.

It seems to us that the beginning and the end of Justice PITNEY's opinion are not on good terms with each other. The opinion opens with the declaration that the court must look through form and into the very heart and substance of FRANK's petition, yet it concludes with an unquestioning acceptance of the sufficiency of "the established modes of procedure" in the Georgia courts. Certainly procedure is form, it is not of the substance. Procedure may kill where the substance would give life. It is the prevailing opinion outside the State of Georgia that that is precisely what is happening in this case.

Justice HOLMES, in his dissenting opinion, does look into the very heart and substance of the matter. The single question for the court, he says, is whether the allegations that "the trial "took place in the midst of a mob "savagely and manifestly intent on a "single result," is shown to be unwarranted. It is not a matter "for "police presumptions, we must look "the facts in the face." The facts are that the trial Judge himself, whose duty it was "to preserve not only

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