APPEAL FOR FRANK, BUT NO CERTIFICATE

Judge Newman Rules It Would Be Contradictory to Admit "Probable Cause."

TO SUPREME COURT AGAIN

Counsel Already on Way to Washington to Lay Matter Before Justices—Move in Reserve Rumored.

Special to The New York Times.

ATLANTA, Ga., Dec. 21.—In the United States District Court here today Judge W. T. Newman announced that he would allow an appeal in the Leo M. Frank habeas corpus case, but would not issue a certificate of "probable cause" for appeal. To issue such a certificate, he said, would be contradictory of his action on Saturday in denying the writ.

Henry A. Alexander, of counsel to Frank, left for Washington tonight to present the matter of appeal to the United States Supreme Court. He expects to reach there Wednesday morning at 1 o'clock. Early that day he will confer with Justice Lamar, presiding over the Georgia jurisdiction of the Supreme Court. Should Justice Lamar, as before, decline to reopen the case, Mr. Alexander will appeal to other Justices, and, failing in this, to the entire Supreme Court bench.

It was rumored today that the defense had still another move in reserve. Neither verification nor denial of this could be obtained. Mr. Alexander and his associates stated that they did not wish to talk of it "at this particular time." Neither would they say whether they were preparing for a final battle before the Governor and the Prison Commission in the event of defeat at Washington.

In announcing his decision on the appeal, Judge Newman said:

"I would be glad to have the Supreme Court pass upon the question presented in this proceeding, but since I have heard the petition and decided that I could not issue the writ, I believe that I cannot say there is 'probable cause for an appeal.' To do so, it seems to me, would be contradictory. To have granted the writ would have meant the discharge of the prisoner, and from the record and what was presented I did not feel that I could do that. I am willing to allow the appeal, but I cannot give a certificate of probable cause for the same."

The Judicial Entry.

Judge Newman's formal order in the matter follows:

Ex parte, Leo M. Frank. Petition for habeas corpus, October term, 1914.

The above-styled motion having been presented to the court and, by order and judgment heretofore made, the prayer of the same for the issuance of the writ of habeas corpus having been denied, and the petitioner having filed his petition for the allowance of an appeal, with the certificate attached, to the Supreme Court of the United States, together with an assignment of errors upon the said order and judgment;

The court declines to grant the appeal prayed, upon the ground that, having refused to grant the issuance of the writ of habeas corpus because the court was of the opinion that, under the facts stated in the petition for the writ and the exhibits attached thereto and referred to therein and made a part of the same, and under the law applicable thereto, if the writ were granted and the hearing given, the petitioner could not be discharged from custody and no relief could be granted thereunder, and that the petitioner was not entitled to the writ, the court could not consistently therewith make the certificate required by the act of Congress of March 10, 1908, as necessary to the allowance of an appeal, to wit: that there is probable cause for such allowance of appeal.

This 21st day of December, 1914.

WILLIAM T. NEWMAN,
District Judge, United States Court.

The court's decision followed the hearing of arguments from Henry C. Peeples for the defense and Solicitor General Hugh M. Dorsey and Attorney General Warren M. Grice for the prosecution. Messrs Grice and Dorsey contended that the State Supreme Court's ruling that the question of Frank's right to have been in the courtroom when the verdict was returned was a matter involving State practice, having been upheld by the Justices of the United States Supreme Court. They contended that the matter was presented in the habeas corpus petition to delay the execution of the State court's judgment.

Criticism for Dorsey.

Prior to his departure at midnight for Washington Attorney Alexander accused Solicitor General Dorsey of having committed "an outrage" before Judge Newman, when he challenged the accuracy of the information submitted to the United States Supreme Court by Frank's lawyers on their previous appeal.

"I challenge Mr. Dorsey's statement that it is to be doubted if the information we presented to the Supreme Court was accurate, and I challenge it emphatically," he said. "It is unfair to charge that Frank, a man fighting in the last ditch for his life, is seeking to create favorable action in his behalf by warping or misrepresenting facts. The Solicitor's accusation is nothing short of an outrage."

Mr. Alexander said he had submitted to Justice Holmes—the Justice who gave the opinion that he did not believe Frank had received due process of law because of the disorderly crowds—the information used in the first Frank retrial motion, which had been certified to by Judge L. S. Roan, the trial Justice.

Mr. Dorsey said before Judge Newman that it was possible Justice Holmes had been misinformed as to the exact facts when he gave his opinion. He did not state, he later declared, that he had accused the defense of submitting inaccurate information; he merely intimated that Frank's lawyers presented only their side of the case.

The Supreme Court appeal, if granted, will not necessarily delay the execution date. Unless the case is in process of consideration before the Supreme Court at the time, Jan. 22 will still remain the day. If the Supreme Court decides in the meantime to decline the appeal, only Executive action will serve to delay the hanging. If, however, the Supreme Court takes the case to hand, the execution will be suspended automatically.

Frank's lawyers will go to the highest Federal Court under the same circumstances as when they presented their recent appeal. There will be no additional angles to the case. They will travel over practically the same ground.

The New York Times
Published: December 22, 1914