

MOVE RESENTENCE OF FRANK TO-DAY

With Death Penalty Again Imposed, Prisoner's Lawyers Will Petition for New Trial.

HIS CHIEF COUNSEL HERE

Rosser Expected to Interview Mrs. Formby, Who Repudiated Her Testimony Against Frank.

Special to The New York Times.

ATLANTA, Ga., March 3.—The way was paved to-day for the resentencing of Leo M. Frank in Judge Hill's court, and for the next move of the defense when the remittitur was received from the Supreme Court by the Clerk of the Superior Court. Solicitor Dorsey, it is understood, will to-morrow move that Frank be brought into court and resentenced. Judge Hill has no option but to grant this motion, and one day this week Frank for the second time will be sentenced for the murder of little Mary Phagan.

It is said that Frank's attorneys will ask for a life sentence for Frank on the ground that he was convicted purely on circumstantial evidence. If such a move is made it will be vigorously contested by the Solicitor General. Lawyers are generally agreed that Judge Hill has no option save to reimpose the death sentence.

Following this, Frank's attorneys will enter an extraordinary motion for a new trial on the ground of newly discovered evidence. The exact nature of this evidence has been carefully guarded, though it is said the defense has sensational affidavits from witnesses who appeared against Frank at his trial.

Frank, when told of the receipt of the remittitur, took the news quietly. The fact that he was soon to hear a Judge pronounce for the second time his death sentence did not shake the convicted man's nerve.

The departure of Attorney Luther Z. Rosser, senior counsel for Frank, for New York and the fact that Attorney Herbert Haas of the Frank defense has been in that city for several days add interest to the statement that further developments in the Frank case are expected in New York. Mrs. Nina Formby, who made an affidavit in New York repudiating damaging statements against Frank, will be interviewed by the attorneys.

The bill of the Solicitor General for original expense in the Frank case shows that A. S. Osborne, a handwriting expert, was employed by the Solicitor in the case, but never was used as a witness. The county paid Osborne \$100 for his opinion on some phase of the case. That is the only thing known about his connection with it. That the defense is seeking to dissolve the element of mystery about his connection with the case is regarded as probable.

According to C. E. Sears, manager of the Atlanta branch of the detective agency, William J. Burns will return to Atlanta from Jackson, Miss., Thursday morning to take up his investigation of the Frank case. Frank and his friends are putting great faith in the efforts of Burns.

PREJUDICE, SAYS ROSSER.

Conviction of Frank Due to Atlanta Conditions, Counsel Declares.

Luther Z. Rosser of Atlanta, chief counsel for Leo M. Frank, who has been convicted of the murder of Mary Phagan and to whom a retrial has been denied by the Supreme Court of Georgia by a divided vote, arrived in New York yesterday. Mr. Rosser at the Knickerbocker last night emphasized the assertions of his associate, Herbert J. Haas, published in THE NEW YORK TIMES last Sunday, that their client had not had a fair trial, and that such a trial was impossible in Atlanta last Summer because of local conditions and the sensational reports that had been spread broadcast concerning the private character of the accused.

Mr. Rosser pointed out that the verdict of the Georgia Supreme Court, in declining to grant a new trial, was not based on the evidence submitted in the lower court, but upon whether errors in laying down and following the law had been made by the Judge who presided at the trial.

"In that respect the law of Georgia differs very materially from that of New York," said Mr. Rosser. "In the Becker case, for instance, your Court of Appeals not only reviewed the method of procedure, but the evidence as well. Under the Constitution of Georgia, our Supreme Court cannot pass upon the evidence in such a case. It must deal only with the question whether the law was violated in the conduct of the case. A majority or even all the members of the Supreme Court might be of the opinion that Frank was innocent, yet that would have nothing to do with their decision.

"Under the law, our only recourse is an extraordinary motion for a new trial on the ground of new evidence discovered. In my opinion, the trial Judge, in view of the fact that in a case where the evidence was purely circumstantial the law gave him authority to impose either a death sentence or life imprisonment, should have become the thirteenth juror. He stated at the time he denied a mistrial that he did not know whether Frank was guilty or innocent, and added that it was not a matter for him to decide, and that, as the jury had so decided, he must concur.

Motion for New Trial Soon.

"The law in Georgia provides that if the counsel for the defense makes a motion for a new trial on the grounds in existence and is overruled, he may then go to the Supreme Court on the ground of error. That decided against him, he can then make an extraordinary motion for a new trial in the lower court. We shall prepare and make our motion within ten days. There have been a number of developments since the last motion, and these will be made its basis."

"Why was Frank convicted?" was asked of Mr. Rosser.

"The reasons are difficult to explain to any one who does not know what the

situation was in Atlanta at the time," replied the lawyer. "My associate, Mr. Haas, pointed out in THE TIMES the other day that a large number of murders had gone unpunished, and that the people and the newspapers were determined that this murder of a little white girl should not go unavenged.

"The Jewish population of Atlanta is not large. Frank came to Atlanta a stranger and engaged in a new enterprise. He knew hardly anybody who was not of his own religion, being closely occupied with his business, and this fact rather counted against him at the time. I really believe, whatever may be the case now, and however much that sort of prejudice may have abated, if Frank had been the son of a reputable Gentile, he would never have been arrested. It was the fact that he was not known and that he was, in a sense, a man apart that, in the minds of people more than willing to find a pretext for prejudice on such an occasion, helped to work against him.

"Then this was an atrocious murder. The perpetrator, or somebody who might be the perpetrator, had to be found. As Frank and others were taken into custody by the police, the newspapers, which were naturally eager to give their readers something interesting to read and quicken the public appetite for more, printed everything that the police would give out about anybody suspected. There was the prejudice, to be found in the South, of the employe class against the employer, and some local prejudice against a stranger. Outrageous statements about the reputation of Frank and about the condition of the body of the girl were printed and given wide circulation.

Statements Still Believed.

"The mere denial of such statements meant nothing. Who would read a little notice of a denial when the day before he had read a sensational accusation? Such was the effect of these published statements that many people in Atlanta to-day still believe them in spite of sworn testimony at the trial that absolutely refuted them. Why they even had it that Frank was a bigamist, and one statement was made that he had murdered his wife.

"The negro 'Jim' Conley was the sole witness to assert that Frank was a man of bad character—a pervert. Little girls were put on the stand by the State who said that they had heard he was such, but the negro was the only witness who claimed to give first-hand testimony.

"That this same Conley is the murderer of that little girl there is not the shadow of a doubt in my mind.

"In reference to the statement of Helen Ferguson, printed in the Atlanta papers yesterday and telegraphed up here, I may say that Mary Phagan had not worked for two days in the pencil factory where she was employed and of which Frank was Superintendent. The hands were usually paid on Friday. Now, Helen Ferguson testified on the witness stand that she had gone to the factory on Friday and asked for Mary Phagan's wages, and that Frank had said to her, 'No,' and that she had left before he could make any further statement. The statement as printed yesterday told that Helen Ferguson had made an affidavit that a week before Mary Phagan was murdered, she was approached by the negro Conley at the same spot on the ground floor of the factory where the defense contends the Phagan girl was killed. It was added that she had testified at the trial that she had asked for Mary's wages on the day before the murder, and that Frank had told her she could not have the money, and added that Mary herself was coming for her wages the next day. Such testimony as this last was not given by Helen Ferguson in the trial as the records will show.

"As for Conley, it would have been impossible to pick out a negro lower in the social scale, a man with a record of many jail sentences, and a reputation for general untrustworthiness. But the prosecution had him shaved and washed up and his hair trimmed, and a new suit of clothes put on him before he was presented to the jury, and that made a difference.

A Hot Weather Verdict.

"In seeking to explain the verdict of the jury, you must be informed that the trial took place in the midst of a hot Summer, and that the audience that thronged the courtroom had been lashed to fury by the newspapers and was kept in that state by the efforts of the prosecution. At such a time the wisest and best people may lose their equilibrium, and in a crisis of the kind somebody must be punished for a crime that has been committed. I think that even in New York it has been asserted that there are times when a man cannot secure a fair trial owing to the pressure of local public sentiment.

"It may be that the Atlanta police were not convinced that Frank was innocent. The peculiar circumstances surrounding the case made it easy for them to make him the scapegoat. Had there not been the charges of perversion, with the evidence they had at their disposal, they would have hanged the negro, and that would have been an end of the whole matter.

"To anybody who knows the negro character, the notes found near the body absolutely show who committed the crime. Henry A. Alexander, a lawyer of Atlanta, who had no personal interest in the case, was so struck with their importance as evidence that he made a study of them and published them in a little pamphlet. Mr. Alexander says he has been unable to detect anything indicating that they were dictated by a white man, as the prosecution claimed, or any trace of a white man's hand in them. It is my opinion that no white man ever could have dictated the notes, whose intention was apparently to fasten the crime upon somebody other than the perpetrator.

"The prosecution claimed that the word 'negro' in the notes was a white man's word. Now, in Georgia white folks call a black man a 'nigger,' but 'negro' is the first word the negro learns to spell at school, and that is the one word that he always pronounces correctly.

"It was really the affidavit of the woman Formby, as presented by the police and which the woman declared in THE TIMES the other day was total perjury, saying the police really put the words into her mouth, that started the talk against Frank's moral character.

"In our extraordinary motion for a new trial we hope first to show that some of the witnesses in the trial now

admit they gave false testimony. There is, for instance, Albert MacKnight, the negro who testified that he had been at the place where Frank boarded on the day of the murder and had seen Frank when he came home, and that the latter was nervous and excited and kept looking at himself in the glass. MacKnight now admits in an affidavit that this was untrue.

"The prejudice worked up by such stories as this especially enraged the workingmen with wives and daughters, until Frank was really tried by a mob, which cheered every point made against him and hissed everything that was in his favor."

"Why was it that the Judge failed to quell the disorder in the courtroom?" Mr. Rosser was asked.

"Well, the Judge would threaten the audience that if it did not do better he would not allow its members to come back. But I think he was largely influenced by the fear that if he tried to hold court with the usual decorum he would start a mob uprising."

"Conley is now in jail, where we cannot see him," said Mr. Rosser, in answer to a question. "He was convicted last week of being an accessory after the fact, which is not a felony under the laws of Georgia, but a misdemeanor, and he has been sentenced to the chain gang for a year. There is some dispute as to whether, having been so tried and convicted, he could be tried for murder. My own theory is that he could not."

"It is true that we have new evidence to offer. One of the most vital questions at stake in the trial was whether Frank was in the pencil factory between 1 o'clock and 1:30 on Saturday afternoon, the day of the murder. We thought we had demonstrated that he was not. We have additional testimony to this effect. The negro claims that he was with Frank disposing of the body from four minutes before 1 until 1:30. He said Frank left the factory at 1:30. If we show that this is not true everything else Conley says falls to the ground and is false.

Frank's Alibi Strong.

"Now, Helen Kern, a girl of 17, a typewriter, of whom we did not hear until long after the trial had begun, gave an important piece of testimony. Her father came to a friend of mine when he heard what Conley had said and told that his little girl knew that the negro's testimony was not true; that he had not wanted his little daughter to get mixed up in the trial, but that he had made up his mind that he would let her testify."

"She stated on the stand that on the afternoon of the murder she had been making some purchases at a store and was to meet a girl friend at 1:10, and to go to the parade that was to take place that afternoon. This was on a corner four blocks from the factory. She looked at a clock on the corner to notice the time, and between 1 and ten minutes past the hour she saw Frank near by, and saw him board a car going in a direction away from the factory. She knew Frank, because she had applied for a position in his office."

"A Mrs. Levy, who lives opposite the house where Frank boarded with his father-in-law and mother-in-law, testified that she was standing at her dressing table near a window overlooking the street. On the table was a clock. She was dressing, looking at the clock at intervals, and watching for her son to come home. When a car stopped she looked out, thinking her son had come. It was Frank. She looked at the clock, wondering what had delayed her son, and noticed that the time was 1:20."

"At that time and a little later, Frank's father-in-law and mother-in-law saw him, and a few minutes later he called up his brother-in-law on the telephone and said he could not go to the baseball game with him, as he had promised, because he had to go back to the factory to finish some work. Indeed, the negro MacKnight, on the stand, said that he had seen Frank at home at 1:30, and his home was a mile and a half away from the factory."

"As the situation stands, do you think Frank could now get a fair trial in Atlanta?" Mr. Rosser was asked.

"While there is still a lot of misinformation and prejudice there, I think people have changed their opinions a great deal," he replied. "At any rate, there is not as strong prejudice as there was. If the trial court agrees, we are willing to have the case tried there again, because we believe people are awakening to a realization that a terrible mistake may have been made."

Mr. Rosser denied that he and Mr. Haas had come to New York to interview William S. Osborne, a handwriting expert, who had been paid by the prosecution to examine the murder notes in the Phagan case.

"The Prosecuting Attorney conferred with Osborne and tried to make him say that Frank had written the notes found near the murdered girl," he said. "As the prosecution later dropped this theory, and agreed that the negro had written them, though, as it claimed at Frank's dictation, there would be no purpose in my seeing Mr. Osborne, and I shall not do so. I came up here on certain business matters, and I may say that this afternoon I have conferred with certain persons who are interested in the Frank case. I expect to leave for home to-morrow or the next day."