

# JUSTICE TO FRANK DOUBTED BY HOLMES

Public Hostility Imperiled Due  
Process of Law, Supreme  
Court Justice Holds.

**BUT DENIES WRIT OF ERROR**

With Lamar, Deems Georgia Decis-  
ion Final—Appeal to Full Su-  
preme Court Monday.

*Special to The New York Times.*

WASHINGTON, Nov. 26.—Associate Justice Holmes of the Supreme Court of the United States, in an opinion refusing to grant a writ of error to bring the case of Leo M. Frank, convicted of the murder of Mary Phagan, a factory girl, in Atlanta in 1913, before the highest Federal court, expressed serious doubt as to Frank's having had the benefit of due process of law in the trial that ended with his being sentenced to death. Justice Holmes did not base this doubt on the fact that Frank was absent from the court room when the verdict was rendered, but on the fact that the trial took place "in the presence of a hostile demonstration and seemingly dangerous crowd, thought by the presiding Judge to be ready for violence unless a verdict of guilty was rendered."

Justice Holmes's opinion, which was given yesterday to Henry Alexander of Frank's counsel, following the counsel's application for a writ of error, follows:

I understand that I am to assume that the allegations of fact in the motion to set aside are true. On these facts I very seriously doubt if the petitioner (Frank) has had due process of law—not on the ground of his absence when the verdict was rendered so much as because of the trial taking place in the presence of a hostile demonstration and seemingly dangerous crowd, thought by the presiding Judge to be ready for violence unless a verdict of guilty was rendered.

I should not feel prepared to deny a writ of error if I did not consider that I was bound by the decision of the Supreme Court of Georgia that the motion to set aside came too late; and even if I thought that the suggestion of waiver was not enough to meet the constitutional question and the right to bring the case here. I understand from the head-note and the opinion that the case was finished when the previous motion for a new trial was denied by the Supreme Court, and, as cases must be ended at some time, that, apart from any question of waiver, the second motion came too late.

I think I am bound by this decision, even if it reverses a long line of cases, and the counsel for the petitioner were misled to his detriment, which I do not intimate to be my view of the case. I have the impression that there is a case in which the ground that I rely on as showing want of due process of law was rejected by the court with my dissent, but I have not interrupted discussion with counsel to try to find it, if it exists.

**Apply to Full Court Monday.**

Before the application for a writ of error was taken to Justice Holmes, it had been denied by Justice Lamar of the same court, who is the presiding judge for both Federal districts in Georgia. While Justice Lamar expressed no views as to a denial of due process of law, his opinion, which also was made public today, referred casually to the cogency of argument for new trials based on the "disorderly conduct of the crowd in and out of the courtroom."

Apparently greatly encouraged by the view of the case taken by Justice Holmes, counsel for Frank have decided to take the case before the full Supreme Court. This will be done next Monday, when Mr. Alexander will ask the court's leave to file with it a petition for a writ of error. Pending the presentation of that request it is not thought that Mr. Alexander will present his petition to any other individual Justice of the court.

Justice Lamar's opinion follows:

**Not a Federal Question.**

The record discloses that on Aug. 25, 1913, Frank was found guilty of murder by a jury in the Superior Court of Fulton County, Ga., he, with the consent of his counsel, being absent from the courtroom when the verdict was rendered. At the same term he made a motion for a new trial, in which the fact of his absence was mentioned, though it was not made a ground of the motion. A new trial was refused, and the case taken to the Supreme Court of Georgia, where the judgment was affirmed. Thereafter, on April 16, 1914, and at a subsequent term of the Superior Court, Frank made a motion to set aside the verdict. The order denying the same was affirmed by the State Supreme Court, and thereupon this application for a writ of error was made.

In its opinion in this case the Supreme Court of Georgia, among other things, held:

1.—That under the due process clause of the Fourteenth Amendment to the Constitution of the United States, Frank was entitled to be present in court at every stage of the trial, including the time when the jury returned their verdict.

2.—That under the laws of Georgia and the practice of its courts a motion for a new trial is a proper method by which to attack a verdict rendered in the prisoner's absence.

3.—That when that method of procedure is adopted the defendant must set out in the motion for a new trial all known grounds of objection to the verdict, including the fact that he was absent when it was rendered.

4.—That having elected to make a motion for a new trial and the judgment denying the same having been affirmed by the Supreme Court, the defendant could not thereafter make a motion to set aside the verdict on the ground that he had been absent from the courtroom when the verdict was rendered.

The laws of the several States fix the method in which and the time at which to attack verdicts because of anything occurring during the progress of the trial, including disorderly conduct of the crowd in and out of the courtroom and the fact that the defendant was not present when the verdict was rendered. It is for the States to determine whether a verdict rendered in the absence of the defendant can be attacked by a motion to set aside the verdict or by a motion for a new trial, or both. The laws of the States also determine whether the denial of one of these motions will prevent the defendant from subsequently making the other.

The decision of the Supreme Court of Georgia in this case holds that, under the laws of that State, where a motion for a new trial was made and denied, the defendant could not thereafter make a motion to set aside the verdict on the ground that he was not present when it was returned by the jury. That ruling involves a mat-

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ter of State practice and presents no Federal question. The writ of error is therefore denied.

## Facts Presented to Justices.

The facts in the case, to which the opinion of Justice Holmes referred, as officially certified by Presiding Judge Roan, were thus set forth by Mr. Alexander in presenting his petition to both Justice Lamar and Justice Holmes:

That fair and impartial trial was not accorded defendant which is guaranteed to him by the Constitution of the United States, as contained in the Fourteenth Amendment to said Constitution, to wit: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In support of this motion, mover alleges that the courtroom wherein this trial was had had a number of windows on the Pryor Street side, looking out on a public street of Atlanta and furnishing access to any noises that might occur upon the street; that there is an open alleyway running from Pryor Street on the side of the Court House, and there are windows looking out from the courtroom into this alley, and that crowds collected therein, and any noises in this alley could be heard in the courtroom; that these crowds were boisterous, and that on the last day of the trial, after the case had been submitted to the jury, a loud and boisterous crowd of several hundred people were standing on the street in front of the Court House, and as the Solicitor General came out greeted him with loud and boisterous applause, taking him upon their shoulders and carrying him across the street into a building wherein his office was located; that this crowd did not wholly disperse during the interval between the giving of the case to the jury and the time when the jury reached its verdict, but during the whole of such time a large crowd was gathered at the junction of Pryor and Hunter Streets; that several times during the trial the crowd in the courtroom and outside of the courtroom, which was audible both to the court and jury, would applaud when the State scored a point; a large crowd of people standing on the outside cheering, shouting, and hurrahing, and the crowd within the courtroom signifying their feelings by applause and other demonstrations; and on the trial and in the presence of the jury the trial Judge in open court conferred with the Chief of Police of Atlanta and the Colonel of the Fifth Georgia Regiment, stationed in Atlanta, which had the natural effect of intimidating the jury and so influencing them as to make impossible a fair and impartial consideration of the defendant's case.

Indeed, such demonstration finally actuated the court in making the request of defendant's counsel, Messrs. Rosser and Arnold, as detailed in Paragraph 3 of this motion, to have de-

fendant and the counsel themselves to be absent at the time the verdict was received in open court, because the Judge apprehended violence to defendant and his counsel; and the apprehension of such violence naturally saturated the minds of the jury so as to deprive this defendant of a fair and impartial consideration of his case, which the Constitution of the United States in the Fourteenth Amendment hereinbefore referred to entitled him to.

On Saturday, Aug. 23, 1913, previous to the rendition of the verdict on Aug. 25, the entire public press of Atlanta appealed to the trial court to adjourn court from Saturday to Monday, owing to the great public excitement, and the court adjourned from Saturday, 12 o'clock noon, to Sunday morning, because he felt it unwise to continue the case that day, owing to the great public excitement; and on Monday morning the public excitement had not subsided and was as intense as it was on Saturday previous; and when it was announced that the jury had reached a verdict the trial Judge went to the courtroom and found it crowded with spectators, and, fearing violence in the courtroom, the trial Judge cleared it of spectators, and the jury was brought in for the purpose of delivering its verdict.

When the verdict of guilty was announced a signal was given to the crowd on the outside to that effect. The large crowd of people standing on the outside cheered and shouted as the jury was beginning to be polled, and before more than one juror had been polled the noise was so loud and confusion so great that the further polling of the jury had to be stopped so as to restore order; and so great was the noise and cheering and confusion from without that it was difficult for the court to hear the responses of the jurors as they were being polled, though the court was only ten feet distant from the jury. All of this occurred during the involuntary absence of this defendant, he being at the time in the custody of the law and incarcerated in Fulton County Jail, his absence from the courtroom having been requested by the court on account of fear of violence to said defendant as hereinbefore recited.