

SLATON TO SPEND TODAY IN STUDY OF FRANK APPEAL

Hearing Adjourned at Mid-day Saturday Until Monday Morning at Request of Solicitor Dorsey.

BROWN TAKES STAND AGAINST COMMUTATION

Former Governor Declares Mercy Should Not Be Permitted to Interfere With the Ends of Justice.

Governor Slaton announced Saturday at the first session of the Leo M. Frank hearing on the commutation appeal that he would confine most of Sunday to study of the Frank case in an effort to conserve time and expedite the hearing now in progress.

An immense mass of documentary evidence, published briefs and other data has been sent to Governor Slaton's country home, where he can spend today in study, preparing himself for the vigorous arguments that are to confront him Monday morning and afternoon.

The main feature of the first morning's session of the final Frank appeal was an address delivered by former Governor Joseph M. Brown, in which he declared that the question of mercy should not enter into the Frank case, and that it should be considered entirely from a judicial standpoint.

The former governor appeared as a member of the delegation from Cobb county, which was organized last Monday night a week ago at the mass meeting held in the Cobb county courthouse, when an audience of Cobb citizens met to protest against the move to commute Frank.

The delegation was headed by M. M. Sessions, a business man of Marietta, who, in a short address, declared that Frank should be made to take his medicine, and that if the doomed man had "been Sessions", his neck would have been broken long ago."

Another address protesting against commutation was made by Herbert Clay, solicitor of the Blue Ridge circuit superior court, whose home is in Marietta. Sessions and the solicitor were followed by Mr. Brown.

Dorsey Preparing Brief.

Solicitor Dorsey busied himself until late Saturday night preparing a brief of argument which he will submit to the governor Monday morning as a part of his fight against the clemency appeal. He was in conference throughout the afternoon with ex-Governor Brown and with Detectives John Starnes and Pat Campbell, prosecutors of Leo Frank and investigators of the Mary Phagan murder.

A visit will be made—Monday, perhaps—to the pencil factory by Governor Slaton. He announced Saturday morning that he desired to inspect the pencil plant building and familiarize himself with surroundings so that he could visualize the various phases of evidence in the case.

The argument for Frank's defense is being made by Attorney William Howard, of Augusta, the former congressman who led the fight before the prison commission. He spent most of Saturday morning outlining the plan of defense he had adopted, which was devoted largely to the evidence in the case. He stated that he would "take the testimony and evidence of the prosecution and reveal the negro Conley guilty instead of Frank."

19 Instances Submitted.

In this regard he submitted to the governor nineteen instances exclusive of the Conley testimony, which, he said, formed the basis of the prosecution. These instances were:

1. Frank was the last person to see Mary Phagan alive.
2. Frank excused Newt Lee from 4 to 6 o'clock in the afternoon.
3. His reluctance to receive Gantt at the factory.
4. He telephoned Newt Lee at 7:30 o'clock p. m.
5. The testimony of Albert McKnight.
6. Frank's nervousness on the morning the body was found.
7. Frank's disinclination to look at the body at the undertaker's.
8. The change in the time slips.
9. His early employment of counsel.
10. His wife's alleged failure to visit him.
11. His failure to inform the detectives that the notes were in the handwriting of Conley.
12. His failure to confront Conley in the presence of detectives.
13. The testimony as to his alleged immoral conduct.
14. Failure of attorneys for the defense to cross-examine character witnesses.
15. Frank's failure to stand cross-examination on the witness stand.
16. The alleged blood spots on the second floor.
17. Alleged hair on turning lathe, second floor.
18. Alleged efforts to approach Mary Phagan.
19. Alleged looking into dressing rooms of women employees.

All these, Attorney Howard declared, were not sufficient to convict Frank, and all could be satisfactorily explained to an unprejudiced mind.

Governor Slaton showed a profound interest in many details of the Frank evidence. It was apparent from the beginning that he intended going exhaustively into the case and leaving no stone unturned. He frequently broke into the remarks of Mr. Howard to press inquiries, and, at times, called upon Mr. Dorsey, who was sitting nearby, for explanations of certain elements of evidence.

Mr. Howard's Speech.

"The petitioners assert the absolute innocence of Leo M. Frank," began Mr. Howard, "but we only ask a commutation of his sentence. We assert and will contend that it is proved by this record that he did not commit the crime. The relief prayed for does not ask a change of the jury's verdict, but simply a change of the penalty. While this is the prayer of the petition, we recognize the constitutional right and duty of your excellency, if firmly convinced of the petitioner's innocence, to grant him a full pardon. However, the petition does not impugn the jury's verdict, but simply asks a change of punishment from blood death to life imprisonment.

"Whatever has been said as to our seeking to impugn the verdict or criticize the judgments in this case is gratuitous and

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should not be considered. Those who protest that your excellency has no right to commute this sentence are aside from the fact that the constitution of the state clothes you with the right."

Slaton Asks Questions.

Here the governor asked: "Do you contend that Judge Roan could have fixed this sentence at life imprisonment?"

"Yes, with propriety," answered the attorney. "My position, your excellency, taken on the record, is that the evidence established beyond a reasonable doubt the guilt of James Conley. This evidence construed and interpreted by the law does not and cannot connect Frank with the murder, Conley, starting with the corpus delicti and pursuing the case to the end, is proven guilty by the record.

"Conley and Frank contrasted by their conduct confirm the contention as a matter of law that Conley must be guilty and that Frank cannot be guilty.

"I will argue that Conley first robbed, then violated, then murdered Mary Phagan."

Here the governor asked: "I have already read 221 pages of the record. When you speak of Conley having assaulted the girl, how do you reconcile the testimony of Dr. Harris, that he found no such evidence?"

"We are going to rely on Dr. Harris' own testimony," said Mr. Howard. "In the course of his testimony he admitted that the absence of the particular evidence he sought, at the late day he performed the autopsy, did not conclusively show there had been no criminal assault.

"I am perfectly willing to rest this question on Dr. Harris' testimony. There was a great controversy between the doctors. My experience has taught me wherever possible to try a case without doctors and diagrams. If I can plant this case on one doctor and that doctor the state's own witness, I am more than satisfied.

"The murder notes form a topic in themselves. There is no dispute as to their physical authorship. The only dispute is concerning their mental authorship. I will undertake to show that both authorships were Conley's.

"If you take the time Mary Phagan entered the factory and the time Conley says she was killed, you will find Conley's testimony absolutely different from the other evidence on the subject."

Governor Slaton here inquired where Mr. Howard contended the girl was killed. Mr. Howard said his opinion from close study of the record that the blow over the eye was the first violence received by the girl, and that she received it as she came down the stairs from the second floor. Further, that this blow stunned her and that while in a stunned condition Conley contrived to take her to the basement, whether through the trap door or the open elevator shaft was not shown by the record outside of Conley's testimony. He said it was quite evident that she got into the basement without her consent and through some form of violence.

Governor Slaton here announced his purpose to make a personal visit to the pencil factory and inspect the scene of the crime.

"There is evidence," said Mr. Howard, "in the record to the effect that there was not room for the body to be taken through the trap door and down the ladder. I shall not dispute that, but if it were left to me I would say that witness didn't know what he was talking about."

Here the governor remarked: "There was some suggestion about the body being thrown down the elevator shaft, but I understand Dr. Hurt testified that he found no bruises on the body."

Mr. Howard replied: "With the exception of Conley's testimony the record is blank as to how she got to the basement. There is no room for doubt, your excellency, there is no room for argument. If Conley's statement is true, then Frank is guilty.

"The records show that Mary Phagan had been laid off several days before the murder; that she earned, that week, only \$1.29; that she went to the factory on Saturday morning to get this money; that after Frank paid her she inquired if the metal had come; that Frank replied that he did not know, or that it had not come, there being some dispute as to his answer."

Trap Door to Basement.

Mr. Howard then reverted to the trap door and the ladder. He said the ladder was steep, but could have been used by such a man as Conley, a young and strong negro; that Conley easily could have gone down the ladder and drawn to him a semi-conscious body, and that he could have protected it from the shock of a fall. He said this was frequently done by firemen in rescuing people from burning buildings, both people alive and people dead or unconscious. He said the trap door was two feet wide and two feet three inches long; that while Conley and the unconscious body could not both go through at the same time, it would have been an easy matter for Conley to go down first, reach back and pull the body after him.

"Is there any evidence to show how long she could have remained alive after the cord was placed around her neck?"

"That is indefinite," replied the lawyer, "but the general impression was that she might have remained alive about fifteen minutes. Also we have the evidence of Dobbs that rigor mortis had not set in. If the injuries which she received had been inflicted before the cord was placed around her neck, much of her life must have been spent."

Governor Slaton asked as to the sufficiency of the evidence if the testimony of Conley is excluded.

Mr. Howard: "It is inadequate to amount even to a suspicion. Every act of Frank's is consistent with innocence, provided the proper explanation is made, which can be done."

Mr. Howard was followed by Mr. Sessions and Mr. Clay. Ex-Governor Brown followed the latter, saying in part:

Governor Brown's Speech.

"During the second term when I sat in the chair which your excellency now conspicuously honors Judge Roan several times came into this office to confer with me about clemency cases. One day, after having a conference regarding an application for pardon, Judge Roan turned to other subjects and made some remarks which I shall never forget. He began talking about the Magna Charta and how the barons and other noblemen of England wrested that chart of human liberties from King John.

"I was exceedingly struck with the fact that out of about fifty-three names of noblemen upon that great instrument, which also bore the signature of the king, quite a portion of the noblemen signed by making their marks. In other words, they didn't even know how to read and write, and yet those unlettered men were so gifted with powers of discernment, with knowledge of human rights, with courage and determination, that they formed the clearest chart of human rights which up to that period the world had ever known.

"Judge Roan then drew from this a comparison of the men drawn from the masses of the people who served as jurors and made clear his conviction that there rested in the minds of the masses of the people a clearness of perception and knowledge not only of our institutions, but of the abstract principles of human rights; that they almost unerringly found the substantial truth in their verdicts. That he maintained the same conviction about the value of the judgment of the jurors in the Frank trial I have seen no reason to doubt.

Judge Roan's Letter.

"Now, as to Judge Roan's letter which has been put into this hearing in this office, I see nothing in it which weakens the state's case. Judge Roan was an upright judge, a patriotic citizen, a golden-hearted gentleman, a sincere Christian. Like other judges, when the duty was on him he discharged it faithfully. He had a full comprehension of the restrictions the constitution placed around him and he stayed within them.

"But after the duty was off his shoulders he was ready to tell the governor that if his sense of duty in a different scope of action led him to a different conclusion, he (Judge Roan) had no criticism to make of him.

"The letter under review was written when the death shadows were stealing over him. At such a time strong men grow mellow. It is no reflection on Judge Roan that he wrote this letter, but the executive office of Georgia will incur a great legal and moral hazard if it does not, as Judge Roan did, firmly discharge its duty to the constitution of Georgia when the necessity is upon it.

"This is truly a remarkable case, in

that it is brought into the executive office on absolutely nothing which has a legal bearing on this case except the evidence upon which it was passed by all the courts and their decisions—except Judge Roan's ante-mortem letter, in which he in no wise expresses his conviction that the trial jury rendered a verdict contrary to the facts proven in the trial. And the governor is asked, by all the logic of this presentation, to make of himself a court of correction, to retry this case on that evidence and to correct all the courts. He is asked to change the genius of our constitution and laws to make mercy, instead of justice, the controlling factor in dealing with one who has been proven to have committed an atrocious crime.

Justice v. Mercy.

"Mercy." As the great Chief Justice Hiram Warner once said, "The word 'mercy' is not found in the constitution of Georgia." And nowhere in the Bible is it used as having the right to defeat justice. The entire teaching of that Book of Books is that justice must be satisfied or mercy can have no part.

"But what says the constitution of Georgia on this subject?"

"To practically prescribe, determine and uphold justice the constitution has established three departments for the government of Georgia. But of these departments it says, section 6374: 'The legislative, judicial and executive powers shall forever remain separate and distinct, and no person discharging the duties of one shall at the same time exercise the functions of either of the others, except as herein provided.'

"For the determination of justice the constitution says:

"On the trial of all criminal cases the jury shall be the judges of the law and the facts. Verdicts are to have a reasonable intendment, and are to receive a reasonable construction, and are not to be avoided unless from necessity."

"The last sentence is manifestly addressed to the governor and to every authority in the state.

"Now, note how carefully the constitution guards the trial jury from coercion or other influence against its freedom of action in determining the application of justice:

"Section 1054. 'It is error for the judge of the superior court, in any case, during its progress, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved, or as to the guilt of the accused; and a violation of the provisions of this section shall be held by the supreme court to be error, and the decision in such case reversed, and a new trial granted, with such directions as the supreme court may lawfully give.'

Duty of the Governor.

"But what says the constitution as to the duty of the head of the executive department? 'He (the governor) shall take care that the laws are faithfully executed,' etc.

"Now, I have adduced these quotations from the constitution of Georgia for the very purpose of emphasizing the fact that the very foundation upon which that constitution is built is justice, that the very intent uppermost with its makers was 'to insure justice'; and to show further that for the accomplishment of this noblest of purposes it forbade any one department of the state government to defeat or unduly interfere with the duty it had specifically placed upon another.

"And I adduce these quotations for the further purpose of showing why I do not believe that the conferring of the pardon power upon the governor carried the open purpose or even inference that he was thereby clothed with the authority to use the executive power to handle the same question on the same evidence on which the courts had handled it and to give it a radically different result.

"The state of Georgia never intended that her constitution should be used to contradict itself.

Says Petitions Worthless.

"But let us look a little further into the application of the constitution to the case under review today.

"That great chart of our rights and duties provides a way for the legislature to enact laws, and for the judiciary to construe them and to determine the application of justice under them; but it provides no way for the executive department to take a vote by petition among the people of Georgia and of other states for the evasion or defeat of those laws, no way for supplanting justice by sympathy. No one is more aware than your excellency of the worthlessness of petitions signed without the sanctity of an oath, as against the requirements of the constitution.

"The constitution requires the impartial application of the laws to all; it does not admit an exception in favor of any class and any person.

"Again, in considering the present case, if justice cannot be determined by the examination and cross-examination of witnesses under oath, in court, how can it be determined with no witnesses present in the governor's office.

Judge Roan's Course.

"The case we are now considering is one of a peculiarly atrocious murder. Of murder the constitution says: 'The punishment of persons convicted of murder shall be death, but may be confinement in the penitentiary for life in the following cases: If the jury trying the case shall so recommend, or if the conviction is founded solely on circumstantial testimony, the presiding judge may sentence to confinement in the penitentiary for life. In the former case it is not discretionary with the judge; in the latter it is.'

"Judge Roan knew perfectly well that this discretion rested with him, but it is clear that he either did not consider the testimony to be solely circumstantial, or he deemed the circumstances making that testimony to be so overwhelmingly conclusive against this defendant that he felt that his oath-bound duty left him no proper recourse save to name the death penalty, and his subsequent action in refusing to grant a new trial leaves no doubt as to the course which he felt constrained to take in finally disposing of the case.

"I cannot see why this case should be differentiated from other murder cases. I cannot see why Leo Frank should have a process different from that had by every other man convicted of murder and I am voicing the protest of, I believe, an enormous majority of the citizens of Georgia against any favoritism over all others.

"And let me say, just here, that there is one feature for consideration in this awful murder which the sentimentalists in Georgia and other states have forgotten, or from which they have strangely turned their thoughts. This is the duty which God Almighty has placed upon the state in all cases when murder has been done."

"I dwell, for I, the Lord, dwell among the people of Israel."

"Mary Phagan's blood today is crying to God from the ground in the state of Georgia. And Georgia is today polluted by that blood, and she cannot be cleansed until God be obeyed, as is commanded in verse 33."

Did Not Ask Recommendation.

"Now, while it has been referred to in this hearing today, let me repeat that it is a notable fact that not one grand juror, or trial juror, or the solicitor general, who successively or co-ordinately had part in the indictment and trial of Leo Frank, has recommended commutation of the sentence passed upon him. In other words, the twenty-three grand jurors, the twelve trial jurors and the solicitor general, numbering thirty-six, who were engaged directly or indirectly in the prosecution of this man, and not one of them has impeached his course.

"In our opinion he is not shown to have been deprived of any right guaranteed to him by the fourteenth amendment, or of any other provision of the constitution, or laws of the United States; on the contrary, he has been convicted, and is now held in custody, under 'due process of law' within the meaning of the constitution."