

STATE OF GEORGIA,
County of Fulton.

I Hereby Certify, That the foregoing pages, hereunto attached, contain a true Transcript of such parts of the record as are specified in the Bill of Exceptions and required, by the order of the Presiding Judge, to be sent to the.....Supreme Court of Georgia..... in the case of

LEO M. FRANK,

Plaintiff in Error.

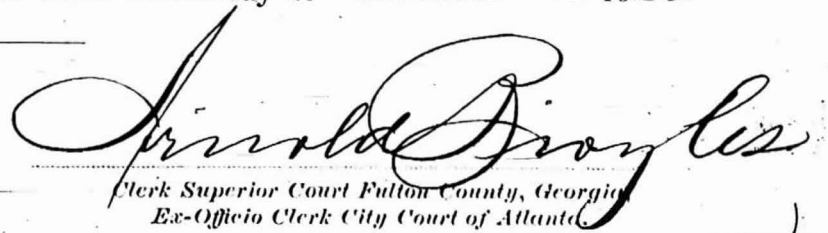
vs.

THE STATE OF GEORGIA,

Defendant in Error.

Witness my signature and the seal of Court affixed

this the..... 15TH day of November 1913.


Clerk Superior Court Fulton County, Georgia
Ex-Officio Clerk City Court of Atlanta

In Poor Condition

No. 18

10852

Criminal Docket

Term, 190

SUPREME COURT OF GEORGIA

Frank

THE STATE.

TRANSCRIPT OF RECORD

Filed in office

NOV 15 1913

W. E. Talley, D.

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Leo M. Frank,)	Bill of Exceptions,
Plaintiff in Error,)	From Fulton Superior court,
vs)	From Conviction of Murder and Judgment of affirmance on February 17th, 1914.
State of Georgia,)	
Defendant in error.)	Motion For Re-hearing.

And now comes Leo M. Frank, Plaintiff in error in the case above stated, who was the losing party therein, and at the same term at which the decision was rendered, and before the remittitur in said case has been forwarded to the clerk of the trial court, and files this his motion for re-hearing, on the grounds following, to-wit:

1. Because the court in rendering the decision in said case overlooked the following material facts, ^{in the record,} to-wit: Ground 58 of the motion for new trial, which reads as follows:

"Because the court permitted the witness, Miss Cato, over the objection of the defendant that the same was incompetent, illegal and immaterial, to testify substantially as follows: 'I know Miss Rebecca Carson. I have seen her go twice into the private ladies' dressing room with Leo M. Frank.'

"The court permitted this testimony over the objection of the defendant made as is aforesaid and in doing so committed error. The court stated that this evidence was admitted to dispute the witness they had called.

"It was wholly immaterial to the issues involved in the case whether Frank did or did not go into a private dressing room with Miss Carson. It did, however, prejudice the jury as indicating Frank's immorality with reference to women."

Said ground just quoted set up material facts constituting error in said case, which the court in the decision rendered, overlooked, and which were not considered in said decision, which appears from the face thereof. Plaintiff in error says that the error committed, as is disclosed from an inspection of the ground here quoted, was material. The facts alleged herein to be overlooked in this ground was discussed in the brief filed by plaintiff in error, as will appear from pages 209 to 212 of the original brief, filed in this case.

2. Because the court in rendering the decision in said case, overlooked the following material facts, ^{in the record,} to-wit: Ground 59 of the motion for new trial, which reads as follows:

"Because the court erred in permitting the witness Maggie Griffin, to testify over the objection of the defendant made when the

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testimony was offered that the same was immaterial, illegal and incompetent, to testify substantially as follows:-

'I have seen Miss Rebecca Carson go into the ladies' dressing room on the fourth floor with Leo M. Frank. Sometimes it was in the evening and sometimes in the morning during working hours. I saw them come in and saw them come out during working hours.'

"The court permitted this testimony to go to the jury over the objection of the defendant made as is aforesaid and in doing so committed error. The court stated that this evidence was admitted to dispute the witnesses they had called.

"It was wholly immaterial to the issues involved in this case whether Frank did or did not go into a private dressing room with Miss Carson; it did, however, prejudice the jury as indicating Frank's immorality with reference to women."

Said ground just quoted set up material facts constituting error in said case, which the court in the decision rendered, overlooked, and which were not considered in said decision, which appears from the face thereof. Plaintiff in error says that the error committed, as is disclosed from an inspection of the ground here quoted, was material. The facts alleged herein to be overlooked in this ground were discussed in the brief filed by plaintiff in error, as will appear from 209 to 212 of the original brief filed in this case.

3. Because the court in rendering the decision in said case, overlooked the following material facts, to-wit: ground one of the motion for new trial, which reads as follows:

"Because the court erred in permitting the solicitor to prove by the witness Lee, that the detective Black talked to him, - the witness, ~~me~~ longer and asked him more questions at the police station than did Mr. Frank the day when he talked to the witness Lee at twelve (12) o'clock at night on April 29th.

"At the request of Black and Scott, the detectives, Frank was induced to have an interview with Lee, the witness, for the purpose of eliciting information from him. The solicitor contended that Frank made no effort to find out anything from Lee, and to that end, sought to show and was permitted to prove by Lee that Black talked longer to him than did Frank at the time stated.

"The defendant, then and there at the trial, objected to such evidence upon the ground that it was irrelevant, immaterial and was a mere conclusion of the witness. The court admitted the evidence over such objections and in doing so erred, because said evidence was unwarranted, immaterial and a mere conclusion of the witness and injurious to the defendant."

Said ground just quoted set up material facts constituting error in said case, which the court in the decision rendered overlooked, and which were not considered in said decision, which appears from the face thereof. Plaintiff in error says that the error committed, as is disclosed from an inspection of the ground here quoted, was material. The facts alleged herein to be overlooked in this ground were discussed in the brief filed by plaintiff in error, as will appear from page

135. to 137 of the Brief filed in this case.

4. Because the court in rendering the decision in said case, overlooked the following material facts in the record, to-wit: ground two of the motion for new trial, which reads as follows:

"Because the court erred in permitting over objections the witness Lee to testify that Frank, on April 28th, when alone with him at the station house, talked to him a shorter time than did Mr. Arnold, one of Frank's attorneys, when he interviewed the witness just before the trial.

"The detectives had induced Frank to talk to Lee alone on April 28th at the station house for the purpose of inducing Lee to talk. Mr. Arnold, in the presence of Lee's Attorney and the jailer, had interviewed Lee just before the present trial.

"The solicitor - over the objections of Frank's attorneys that the evidence offered was immaterial, irrelevant, and the expression of an opinion, was permitted by introducing said evidence to draw a comparison of the time occupied by Frank and Arnold to their respective interviews, and, in doing so, the court erred because the evidence offered was immaterial, irrelevant and the expression of an opinion."

Said ground just quoted, set up material facts constituting error in said case, which the court in the decision rendered overlooked, and which were not considered in said decision, which appears from the face thereof. Plaintiff in error says that the error committed, as is disclosed from an inspection of the ground here quoted, was material. The facts alleged herein to be overlooked in this ground were discussed in the brief filed by plaintiff in error, as will appear from pages 135 to 137 of the Brief filed in this case.

5. Because the court in rendering the decision in said case, overlooked the following material facts in the record, to-wit: ground seven of the motion for new trial, which reads as follows:-

"Because the court, over objection made when the evidence was offered that the same was irrelevant, permitted the witness Black to testify that Frank had counsel, Messrs Rosser and Haas about eight or eight thirty o'clock Monday morning while Frank was in the station house, brought there by detectives Black and Haslett.

"Movant contends the employment of counsel, under the circumstances was no evidence of guilt; but the court's conduct in submitting the fact to the jury was greatly hurtful to the defense.

"Said evidence was illegal, irrelevant and prejudicial and its admission over objection is here assigned as error for said reasons."

Said ground just quoted set up material facts constituting error in said case, which the court in the decision rendered overlooked and which were not considered in said decision, which appears from the face thereof. Plaintiff in error says that the error committed, as is disclosed from an inspection of the ground here quoted, was material.

The facts alleged herein to be overlooked in this ground were discussed in the brief filed by plaintiff in error, as will appear from pages 140

to 141 of the brief filed in this case.

6. Because the court in rendering the decision in said case, overlooked the following material facts in the record, to-wit: ground 16 of the motion for new trial, which reads as follows:

"Because the court, over objection of the defendant, made at the time the evidence was offered, that the same was irrelevant, immaterial and not binding on Frank, permitted the witness, Mrs. White, to testify that Arthur White, her husband, and Campbell are both connected with the Pencil Company and that she never reported seeing the negro on April 26th, 1913, which she testified she did see in the pencil factory, to the City detectives until May 7th, 1913.

"For the reasons above stated, the court erred in not excluding the evidence, and for the reason that the solicitor, in his address to the jury, contended that the fact that there was a negro (which he contended was Conley) in the factory the morning of April 26th, was concealed from the authorities and that such concealment was evidence of Frank's guilt."

Said ground just quoted, set up material facts constituting error in said case, which the court in the decision rendered overlooked and which were not considered in said decision, which appears from the face thereof. Plaintiff in error says that the error committed, as is disclosed from an inspection of the ground here quoted, was material. The facts alleged herein to be overlooked in this ground were discussed in the brief filed by plaintiff in error, as will appear from pages 213 of the brief filed in this case.

7. Because the court in rendering the decision in said case, overlooked the following material facts in the record, to-wit: ground 23 of the motion for new trial, which reads as follows:

"Because the court permitted, over the defendant's objection, made when the testimony was offered, that it was illegal, immaterial, and because it could not be binding on the defendant, the witness S.L. Rosser, to testify that since April 26th, 1913, he had been engaged in connection with this case; that he visited Mrs. Arthur White subsequent to April 26th; that the first time the witness ever claimed to have seen the negro at the factory when she went into the factory on April 26th was some time about the 6th or 7th of May.

"The court, over objections as stated, admitted the testimony just above, and in doing so erred, for the reasons herein stated.

"This was particularly prejudicial to the defendant, because the solicitor contended in his argument to the jury that the fact that factory employees did not disclose the fact that Mrs. White saw the negro on April 26th was evidence that the defendant was seeking to suppress testimony material to the discovery of the murderer."

Said ground just quoted, set up material facts constituting error in said case, which the court in the decision rendered overlooked, and which were not considered in said decision, which appears from the face thereof. Plaintiff in error says that the error committed, as is

disclosed from an inspection of the ground here quoted, was material.
The facts alleged herein to be overlooked in this ground were discussed
in the brief filed by the plaintiff in error, as will appear from pages
213 to 215 of the brief filed in this case.

8.- Because the Court, in rendering the decision in said case, overlooked the following material facts in the record, to-wot, Ground 26 of the motion for new trial, which reads as follows:

"Because the Court, in permitting the witness, Harry Scott, to testify over the objection of defendant, made at the time the testimony was offered that the same was irrelevant, immaterial and not binding upon the defendant, that he did not get any information from any one connected with the National Pencil Company that the negro Conley could write, but that he got his information as to that from entirely outside sources, and wholly disconnected with the National Pencil Company.

"The Court permitted this testimony to be given over the objections above stated, and in doing so, for the reasons therein stated, committed error.

"This was prejudicial to the defendant, because the negro Conley at first denied his ability to write, and the discovery that he could write was as the State contended the first step towards connecting Conley with the crime, and the Solicitor contended in his argument to the jury that the fact that the Pencil Company authorities knew Conley could write, and did not disclose that to the State authorities, was a circumstance going to show the guilt of Frank".

Said ground just quoted set up material facts constituting error in said case, which the Court in the decision rendered overlooked, and which were not considered in said decision, which appears from the face thereof. Plaintiff in error says that the error committed, as is disclosed from an inspection of the ground ~~just~~ quoted, was material. The facts alleged herein to be overlooked in this ground were discussed in the brief filed by plaintiff in error, as will appear from pages 231 to 234 of the original brief, filed in this case.

9.- Because the Court, in rendering the decision in said case, overlooked the following material facts in the record, to-wit, Ground 27 of the motion for new trial, which reads as follows:

"Because the Court permitted the witness, Harry Scott, to testify over the objection of defendant's counsel, made when the testimony was offered, that the same was irrelevant, immaterial, illegal and not binding on the defendant, that the witness first communicated Mrs. White's statements about seeing a negro on the street floor of the pencil factory on April 26, 1913, to Black, Chief Lanford, and Bass Rosser, that the information was given to the detectives on April 28.

"The Court, over the defendant's objection, permitted the above testimony to be given, and in doing so erred for the reasons above stated. This was prejudicial to the defendant, because it was contended by the State that this witness, Harry Scott, who was one of the Pinkerton detectives who had been employed to ferret out the crime, by Frank acting for the National Pencil Company, had not promptly informed the officials about the fact of Mrs. White's seeing this negro, and that such failure was evidence pointing to the guilt of Frank".

This witness was one of the investigators for the Pinkerton Detective Agency, who was employed by Frank acting for the National Pencil Company to ferret out this crime".

Said ground just quoted set up material facts constituting error in said case, which the Court in the decision rendered, overlooked, and which

were not considered in the decision, which appears from the face thereof. Plaintiff in error says that the error committed, as is disclosed from an inspection of the grounds here quoted, was material. The facts alleged herein to be overlooked in this ground were discussed in this brief filed by plaintiff in error, as will appear from pages 213 to 215 of the original brief, filed in this case.

10.- Because the Court, in rendering the decision in said case, overlooked the following material facts in the record, to-wit, Ground 32 of the motion for new trial, which reads as follows:

"Because the Court erred in declining to allow the witness, Miss Hall, to testify that on the morning of April 26, and before the murder was committed, Mr. Frank called her over the telephone, asking her to come to the pencil factory to do stenographic work, stating at the time he called her that he had so much work to do that it would take him until six o'clock to get it done.

"Defendant contends that this testimony was part of the res gestae and ought to have been heard by the Court, and failure to do so committed error".

Said ground just quoted set up material facts constituting error in said case, which the Court, in the decision rendered, overlooked, and which were not considered in said decision, which appears from the face thereof. Plaintiff in error says that the error committed, as is disclosed from an inspection of the grounds here quoted, was material. The facts alleged herein to be overlooked in this ground were discussed in the brief filed by plaintiff in error, as will appear from pages 289 to 292 of the original brief, filed in this case.

11.- Because the Court, in rendering the decision in said case, overlooked the following material facts in the record, to-wit, Ground 34 of the motion for new trial, which reads as follows:

"Because, while Mrs. Freeman was on the stand, after testifying as to other things, she testified that while she and Miss Hall, on April 26, were at the restaurant immediately contiguous to the pencil factory, and after they had left the factory at 11.45 o'clock a. m., and had had lunch that Lemmie Quinn came in and stated that he had just been up to see Mr. Frank.

"Upon motion of the Solicitor, this statement that he had been up to see Mr. Frank was ruled out as hearsay.

"This statement of Lemmie Quinn was a part of the res gestae, and was not hearsay evidence, and was material to the defendant's cause. Lemmie Quinn testified that he saw Mr. Frank in his office just before he went down to the restaurant and had the conversation with Mrs. Freeman and Miss Hall; this testimony was strongly disputed by the Solicitor. Lemmie Quinn's statement that he was in Frank's office just before going into the restaurant was of the greatest moment to the defendant, because it strongly tended to dispute the contention of the State that Mary Phagan was killed between twelve and half past.

"The Court erred in ruling out and declining to hear this, for the reasons above stated. The testimony was relevant, material and part of the res gestae, and should have been sent to the jury".

Said ground just quoted set up material facts constituting error in said case, which the Court in the decision rendered, overlooked, and which were not considered in said decision, which appears from the face thereof. Plaintiff in error says that the error committed, as is disclosed from an inspection of the ground here quoted, was material. The facts alleged herein to be overlooked in this ground, were discussed in the brief filed by plaintiff in error, as will appear from pages 289 to 292 of the original brief, filed in this case.

12. Because the court in rendering the decision in said case, overlooked the following material facts, to-wit: Ground 55 of the motion for New Trial, which reads as follows:

"Because the Court permitted the witness L. T. Kendrick over the objection of the defendant, made at the time the evidence was offered that the same was irrelevant, immaterial and incompetent, to testify substantially as follows:

'The clock at the pencil factory, when I worked there, needed setting about every 24 hours. You would have to change it from about three to five minutes, I reckon.'

The Court permitted this testimony to be heard over the above stated objections of the defendant, and in doing so committed error.

Kendrick had not worked at the factory for months and whether or not the clock was correct at that time was immaterial and tended to confuse the jury in their effort to determine whether or not the clock was accurate upon the date of the tragedy."

Said ground just quoted sets up material facts constituting error in said case - which the court in the decision rendered overlooked, and which was not considered in said decision as appears from the fact thereof. Plaintiff in error says that the error committed, as is disclosed from an inspection of the ground here quoted, was material. The fact alleged herein to be overlooked in this ground was discussed in the brief filed by plaintiff in error, as will appear from page 46 of the reply brief filed in this case.

13. Because the court in rendering the decision in said case, overlooked the following material facts, to-wit: Ground 67 of the Motion for New Trial, which reads as follows:

"Because the Court erred in failing to charge the jury that if a witness knowingly and wilfully swore falsely in a material matter, his testimony shall be rejected entirely, unless it be corroborated by facts and circumstances of the case or other creditable evidence.

The Court ought to have given this charge, although no written request was formally made therefor, for the reason that the witness Jim Conley, who testified as to aiding Frank in the disposal of the body, was attacked by the defendant as utterly unworthy of belief, and he admitted upon the stand that he knew that he was lying in the affidavits made by him, with reference to the crime and before the trial.

Especially ought this charge to have been given, because the Court, in his charge to the jury, left the question of the credibility of witnesses to the jury, without any rule of law to govern them in determining their credibility."

Said ground just quoted set up material facts constituting error in said case - which the court in the decision rendered

overlooked, and which was not considered in said decision as appears from the face thereof. Plaintiff in error says that the error committed, as is disclosed from an inspection of the ground here quoted, was material. The fact alleged herein to be overlooked in this ground was discussed in the brief filed by plaintiff in error, as will appear from pages 298 to 300 of the brief filed in this case.

14. Because the court in rendering the decision in said case, overlooked the following material facts, to-wit: Ground 54 of the Motion for New Trial, which reads as follows:-

"Because the Court permitted the witness Scott to testify in behalf of his Agency, over the objection of the defendant, that the same was irrelevant, immaterial and incompetent, substantially as follows:

'I got hold of the information about Conley knowing how to write through my operatives that I had investigating while I was out of town. McWorth told me in person when I returned.'

The Court permitted this testimony over the defendant's objections, as above stated, and in doing so committed error. This was prejudicial to the defendant, because the solicitor contended that the failure of Frank to report the fact that Conley could write, was a circumstance against Frank's innocence, and he sought to show by the above testimony that the detectives were forced to get that information from someone other than Frank."

Said ground just quoted set up material facts constituting error in said case - which the court in the decision rendered overlooked, and which were not considered in said decision as appears from the face thereof. Plaintiff in error says that the error committed, as is disclosed from an inspection of the ground here quoted, was material. The fact alleged herein to be overlooked in this ground was discussed in the brief filed by plaintiff in error, as will appear from pages 231 to 234 of the brief filed in this case.

15. Because the Court in rendering the decision in said case, overlooked the following material facts, to-wit: Ground 53 of the Motion for New Trial, which reads as follows:-

"Because the Court permitted the witness J. M. Gantt, over the objection of the defendant, made when the evidence was offered that the same was irrelevant and immaterial, to testify substantially as follows:

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"The clock of the pencil company was not accurate. They may vary all the way from three to five minutes in 24 hours."

The Court admitted this testimony over the objections made and in doing so committed error, for the reasons stated.

This was prejudicial to the defendant, because whether the clocks were or were not accurate on April 26th was material to his defense. The witness Gantt had not worked at the factory for three weeks and the fact that the clocks were not keeping accurate time three weeks before the trial was immaterial, and the evidence thereon tended to mislead and confuse the jury. Gantt had not worked at the factory during the three weeks just prior to the crime, and his testimony as to the clocks related to the time he did work at the factory."

Said grounds just quoted set up material facts constituting error in said case - which the court in the decision rendered overlooked, and which were not considered in said decision as appears from the face thereof. Plaintiff in error says that the error committed, as is disclosed from an inspection of the ground here quoted, was material. The fact alleged herein to be overlooked in this ground was discussed in the brief filed by plaintiff in error, as will appear from page 46 of the reply brief, filed in this case.

16. Because the Court in rendering the decision in said case, overlooked the following material facts, to-wit: Ground 42 of the Motion for New Trial, which reads as follows:

"Because the Court permitted McWorth, at the instance of the Solicitor-General to testify over the objections of the defendant, made when the evidence was offered, that the same was irrelevant, immaterial and illegal:

"I reported it (the finding of the club and envelope) to the police force about 17 hours afterwards. After I reported the finding, I had a further conference with the police about it about four hours afterwards. I told John Black about the envelope and the club. I turned the envelope and club into the possession of H. B. Pierce."

The Court heard this testimony over the objection of the defendant, made as above stated, and in doing so committed error, for the reasons herein stated.

This was prejudicial to the defendant, because the Solicitor-General contended that his failure to sooner report the finding of the club and the envelope to the police were circumstances against Frank. These detectives were not employed by Frank, but by Frank for the National Pencil Company, and movant contends that he is not bound by what they did or failed to do. The Court should have so instructed the jury."

Said ground just quoted set up material facts constituting error in said case - which the court in the decision rendered overlooked, and which were not considered in said decision as appears from the face thereof. Plaintiff in error says that the

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error committed, as is disclosed from an inspection of the ground here quoted, was material. The fact alleged herein to be overlooked in this ground was discussed in the brief filed by plaintiff in error, as will appear from page 45 of the reply brief filed in this case.

17. Because the court in rendering the decision in said case, overlooked the following material facts, to-wit: Ground 35 of the Motion for New Trial, which reads as follows:

"Because the Court permitted, at the instance of the Solicitor-General, the witness Sig Montag, to testify over the objection of the defendant, made when same was offered, that same was irrelevant, immaterial and incompetent; that the National Pencil Company employed the Pinkertons; that the Pinkertons have not been paid, but have sent in their bills; that they sent them in two or three times; that, otherwise, no request has been made for payment, and that Pierce, of the Pinkerton Agency, has not asked the witness for payment.

In permitting this testimony to go to the jury, over the objections above stated, the Court erred.

The introduction of this evidence was prejudicial to the defendant, for the reason that the solicitor contended that the pay due the Pinkertons by the Pencil Company was withheld for the purpose of affecting the testimony of the agents of that Company."

Said ground just quoted set up material facts constituting error in said case - which the Court in the decision rendered overlooked, and which were not considered in said decision as appears from the face thereof. Plaintiff in error says that the error committed, as is disclosed from an inspection of the ground here quoted, was material. The fact alleged herein to be overlooked in this ground was discussed in the brief filed by plaintiff in error, as will appear from page 45 of the reply brief filed in this case.

18. Because the court in rendering the decision in said case, and in the 17th head note and in the 17th division of the opinion, held (as the head note reads): "From the evidence, the court is authorized to find that the jury was not influenced to render other than true answers to the questions propounded," By a loud cheering from persons on the outside of the courthouse which took place while the polling of the jury was being taken; and further on, in the body of the opinion, under division 17, the court use the following language upon this same subject: "We think that the affidavits of jurors submitted in regard to this occurrence was sufficient to show that there was no likelihood that there was any such result. Under such circumstances we do not think that the occurrence complained of amounts to more than an irregularity which was not prejudicial to the accused."

The plaintiff in error respectfully submits that the court ⁱⁿ rendering this decision, overlooked the case of Collier vs the State, reported in 115 Ga., page 803; and in said Collier case the disorder occurred in the hearing of the jury, and in the language of the Collier decision: "Each one of the jurors who tried the case testified by affidavit and they all agreed in the statement that they were not influenced by any demonstration; that the noise in the courthouse yard had no effect upon them as jurors; and that they were controlled alone by the evidence in the case and endeavored to return a proper verdict and they continued of the opinion that they had done so." The Collier case proceeds to recite further evidence of the jurors, - all tending to show that they were not influenced by the demonstration, - and the two court bailiffs likewise made affidavits. In the Collier decision it was held broadly, as the head note reads - that the plaintiff in error did not have a fair and impartial trial in the manner contemplated by law, which is guaranteed to him by the constitution of this state; and that whether the verdict was or was not supported by the evidence, it should, for that reason be set aside, and the court on page 808 of the decision, say: "It would be mere idle talk to say that the jurors did not understand that the demonstration was against the prisoner on trial. It is true that each of the jurors testified that the noise and demonstration made by this crowd did not affect his verdict." Further on, in the same decision, on the same page, the court say: "We have no reason to, and do not doubt that each member of the jury who testified was sincere and honest

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in his belief that his verdict was in no way affected by the demonstration during the progress of the trial or by that which subsequently occurred while the jury were considering their verdict. But the question is not whether in effect the jurors were influenced by this demonstration, but were the demonstrations calculated to influence the jurors in their action." And the court proceed to cite the Wolfolk case, 81st Ga., 551 and the case of Smith vs Lovejoy, 62nd Ga., 392, in which the court held in fact that the affidavits of jurors did not clear up such a matter, as it was impossible for them to tell what had influenced their minds.

Plaintiff in error submits that the decision in the case at bar is contrary to the decision in the Collier case, in the Wolfolk case and in the case of Smith vs Lovejoy, and as neither of said decisions are quoted or referred to in the opinion, - plaintiff in error respectfully submits that they were overlooked by the court.

19. Plaintiff in error respectfully submits that the court overlooked the facts stated in ground 89 of the motion which was referred to and argued on page 198 of the printed brief of plaintiff in error, which refers to the testimony of the witness Owens, to the effect that he ran on route 8 of the street railway in Atlanta, from White City to Howell Station; that he was due in town at 12:05, this being ahead of the schedule of Cooper Street and English Avenue two minutes; that he has known the English Avenue and Cooper Street cars to get to the junction of Marietta and Broad Streets ahead of his car; that the English Avenue car is due there at 12:07 and the witness' schedule was due at 12:05; that he has known the English Avenue car to get there as much as two minutes ahead; that he has known this to occur after April 26th, which was the day of the tragedy; but that he did not know whether it ever occurred prior to that time.

Plaintiff in error submits that this testimony of Owens stands on a ground distinct and apart from the testimony of the other street car men to the effect that at and prior to the day of the tragedy, the street cars on this line may have run ahead of schedule time. Head note 6 of the decision and the corresponding portion of the opinion deals with this subject, and it uses the language that it was competent for the state to show that in fact the car on the line traveled by the girl in going from her home to the factory frequently arrived at the point in question several minutes

ahead of schedule.

In the body of the opinion, the testimony of the state which was introduced as showing the time of arrival of cars was that of an inspector who testified that once or twice he called attention to the motor-man running in ahead of schedule time, and two other witnesses who testified that they were operatives on the line in question and that they had known the car to come in several minutes ahead of schedule time. There is ^{no} distinct notice in the opinion of the witness Owens whose only testimony related to a period after April 26th.

Counsel for the defendant conclude that the court overlooked the special point made on the testimony of Owens to the effect that whether ^{the} testimony is generally admissible or not, showing this car to have come in ahead of schedule time at and before the day of the tragedy, - that after the date of the tragedy, it could have no possible bearing on the case, - the criticism in the brief of Plaintiff in error, on pages 198 and 199 being as follow: "Owens' testimony deals wholly with transactions occurring after the murder. Whether the English Avenue car scheduled for Broad Street at 12:07 - ~~got there on time~~ on April 26th was the issue. When it got there on any other day after April 26th was of no possible moment; that a given car broke its schedule after a given date in no way illustrates whether it did or did not break it at any prior date."

20. Plaintiff in error contends that the court in deciding such case, overlooked the following material proposition in deciding upon the admissibility of the witness Conley's testimony. The court decided ~~that~~ ^{to} ~~construe~~ as counsel for plaintiff in error ~~considered~~ the decision that Conley, having said that Frank remarked "Of course, you know, I ain't built like other men" - and from the condition of the body, - it being inferable that the person who did the killing sought to have a sexual relation, natural or un-natural, with the deceased, - that it was relevant to explain the expression quoted by showing previous transactions of the accused known to him ~~and~~ ^{and} the witness, which indicated that his conduct in sexual matters differs from that of other men.

Plaintiff in error submits that the remark quoted as to being built like other men is no evidence of any connection, natural or un-natural, with any female and is no evidence that any transaction occurred between the deceased and the defendant of any kind or description; and further submits that there is no evidence in the record whatever showing any kind of sexual relation between the deceased and any person at or just before the time of the killing.

Plaintiff in error submits that in as much as the alleged remark made by the accused according to Conley's testimony, was no evidence of any sexual act and was indeed no evidence of any transaction between the accused and deceased; that it could not be explained by or made the basis for the evidence of other un-natural crimes as testified to by the witness Conley.

21. Plaintiff in error shows that in the 19th head note, the court recites that where the order overruling the motion for new trial contains nothing which could indicate that the judge was dissatisfied ~~the~~ with the verdict or that he failed to exercise discretion "The Supreme court will not in determining whether the judge has exercised such discretion consider oral remarks by him, pending the disposition of the motion."

Plaintiff in error contends that the remarks made ~~upon~~ by the judge which form the basis of the ground under consideration, were not merely made pending the disposition of the motion for new trial but were part of the oral judgment delivered by the court, disposing of the motion. They were as much a part of the decision of the motion for new trial as that part of the decision which denied the new trial, and it so appears in the Bill of Exceptions, ~~as~~ ^{and} plaintiff in error contends that the court overlooked this feature of the record.

Respectfully submitted,

L. J. Roesser,
Richard B. Arnold,
Herbert Haas
Leonard Haas,
Attorneys for Plaintiff in Error.

SECRET

The undersigned, L. Z. Rosser, Reuben R. Arnold, Herbert Haas and Leonard Haas, do hereby certify that they are counsel for plaintiff in error in the case above stated, and that upon careful examination of the opinion of the Supreme Court therein, - they and each of them believe that the facts set forth in the foregoing motion for re-hearing have been overlooked.

This 24th, day of February, 1914.

L. Z. Rosser

Reuben R. Arnold

Herbert Haas

Leonard Haas

Attorneys for Plaintiff in Error.