The Court admitted these sample of partly digested cabbage taken from the stomach of others, as aforesaid, and in doing so, committed error for the reasons above stated, and for the furth er reason that there was no evidence, as the defendant's counsel contend, that the same circumstances and conditions surrounded these other parties in the eating and digestion of the cabbage as surrounded Mary Phagan in the eating and digestion on her part and no evidence that the stomachs of these other parties were in the same condition as was Mary Phagan!s.

26. 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 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 Co.

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.

27. 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 [redacted] floor of the pencil factory on April 26 [redacted] Chief Lanford, and Bass Rosser, that the information was given to the detectives on April 28th.

The Court, over the defendant's objections, 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.

28. Because the Court permitted Harry Scott, a witness for the State, to testify over the objection of the defendant, made at the time that same was offered, that the same was irrelevant, immaterial, illegal and prejudicial to the defendant/ that the witness, in company with Jim Conley, went to the jail and made an effort to see Frank. And that after Conley made his last statement(the statement about writing the notes on Saturday) Chief Beavers, Chief Lanford and the witness went to the jail for the purpose of confrontingFrank. That Conley went with them that they saw the Sheriff and explained their mission to him and the Sheriff went to Frank's cell, that the witness saw Frank at the jail on May 3rd, (Saturday), and that Frank refused to see Conley only through Sheriff Mangum; that was all

The Court, in admitting this testimony over the objections made, erred for the reasons stated above. This was error prejudicial to the defendant, because the witness Mangum, over the defendant's objection, had already been allowed to testify that Frank declined to see Chief Lanford, Chief Beavers, the witness and Conley, except with the consent of his counsel or with his counsel, and the solicitor in his argument asserted that the failure of Frank to see the witness while he wasemployed by the Pencil company to ferret out the crime in the presenceof the negro and the two chiefs was strong evidence of his guilt.

29. Because J. M. Minar, a newspaper reported for the Atlanta Georgia, was called by the defendant for the purpose of impeaching the witness George Epps, who claimed that on Saturday of the

crime he accompanied Mary Phagan from a point on Bellwood Ave., to the center of ~~the City~~ of Atlanta, by showing that on April 27th at the house of Epps, he asked George, together with his sister, when was the last time they saw Mary Phagan. In reply, the sister of Epps said she had seen Epps on the previous Thursday, but the witness Epps said nothing about having come to ~~town with Mary Phagan the day of the murder~~ but did say he had ridden to town with her in the mornings of other days occasionally

Upon cross Examination, over the objection of defendant's counsel made when the cross examination was offered, that the same was irrelevant, immaterial, incompetent, prejudicial to the defendant, and not binding on the defendant, the witness was allowed to testify that he went to the houseof Epps in his capa city of reporter; that one Clofine was the City Editor and that the witness was under him and that Clofine was a constant visitor of Frank at the jail.

The Court admitted this testimony over the objections aforesaid and in doing so erred . There was no evidence of any relationship between Frank and Clofine which could show any prejudice or bias in Frank's favor, even by Clofine and certainly none on the part of the witness Miner.

30. Because the Court erred in permitting the witness Schiff to testify over the objection of defendant made at the time the testimony was offered that the same was incompetent, irrelevant and immaterial, that it was not Frank's custom to make engagement Friday for Saturday evening, then go off and leave the financial sheet that had to be over at Montag's Monday morning not touched.

~~The Court permitted this testimony~~ over the objection of defendant and therein erred, for the reasons stated.

~~This was prejudicial, because it was the contention of the~~ State that Frank, contrary to his usual custom, made an engagement on Friday before the crime to go to the baseball game on Saturday afternoon, leaving the financial sheet unfinished, although such sheet ought to have been prepared on Saturday and sent to Montag's to the General Manager of the factory on Monday. The only material issue was what took place Friday and Saturday and

it was wholly immaterial as to what his custom previous to that time had been.

31. Because, during the trial the following colloquy took place between the solicitor and the witness Schiff:

Q. Isn't the dressing room back behind these doors?

A. Yes, it is behind these doors.

Q. That is the fastening of that door, isn't it?

A. Yes.

Q. And isn't the dressing room back there then?

A. That isn't the way it is situated.

Q. It isn't the way it is situated?

A. It is not, no, sir.

Q. Why, Mr. Schiff, if this is the door right here and—

A. Mr. Dorsey I know that factory.

Q. Well, I am trying to get you to tell us if you know it; you have no objection to telling it, have you?

(Here objection was made by defendant's counsel that Schiff had shown no objection to answering the questions of the solicitor and that such questions as the one next above, which indicated that the witness did object to answering was improper.)

Mr. Dorsey: I have got a right to show the feeling.

The Court: Go on, now, and put your questions.

Mr. Dorsey: Have you any objections to answering the question, Mr. Witness?

A. No, sir; I have not.

These comments of the solicitor, reflecting upon the witness were objected to and the Court urged to prevent such reflections.

This the Court declined to do and allowed the solicitor to repeat the insinuation that the witness was objecting to answering him.

This was prejudicial error. The witness deserved no such insinuations as were made by the solicitor and in the absence of the requested relief by the Court, the jury was left to believe that the reflections of the solicitor were just.

This witness was one of the main leading witnesses for the defendant, and to allow him, movant contends, to be thus unjustly discredited was harmful to the defendant.

32. Because the Court erred in declining to allow the witness Miss Hall to testify that on the morning of April 26th, and before the murder was committed, Mr. Frank called her over the telephone, asking her to come to the pencil factory to do steno graphic 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 that day to get it done.

The 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.

33. Because, while Philip Chambers, a youth of 15 years of age, and a witness for the defendant, was testifying the following occurred.

Q. You and Frank were pretty good friends, weren't you?

A. Well, just like a boss ought to be to me.

Q. What was it that Frank tried to get you to do that you told Gantt about several times?

A. I never did complain to Mr. Gantt.

Q. What proposition was it that Mr. Frank made to you and told you he was going to turn you off if you didn't do what he wanted you to?

A. He never made any proposition to me.

Q. Do you deny that you talked to Mr. Gantt and told him about these improper proposals that Frank would make to you and told you that he was going to turn you off unless you did what he wanted you to do?

A. I never did tell Gantt anything of the sort.

(Objection was here made by the defendant that the answer sought would be immaterial.)

The Court: Well, I don't know what it is, ask him the question.

Q. Didn't you tell Gantt the reason why Frank said he was going to turn you off.

A. No sir.

Q. Didn't Frank tell you he was going to turn you off unless you would permit him to do with you what he wanted to do.

A. No sir.

Q. No such conversation ever occurred?

A. No sir.

Q. With J. M. Gantt, the man who was bookkeeper and was turned off there?

A. No sir, I never told him any such thing.

Q. No such thing ever happened?

A. No sir.

Mr. Arnold: Before the examination progresses any further, I want to move to rule out the witness said there wasn't any truth in it, but I want to move to rule out the questions and answers in relation to what he said Frank proposed to do to him right now. I think it is grossly improper and grossly immaterial; the witness says there is no truth in it, but I move to rule it out.

Mr. Dorsey: We are entitled to show the relations existing between this witness and the defendant, your Honor.

Mr. Arnold: We move to rule out as immaterial, illegal and grossly prejudicial and as grossly improper, and the gentleman knows it, or ought to know it, the testimony that I have called you Honor's attention to.

The Court: Well, what do you say to that, Mr. Dorsey? How is this relevant at all over objection?

Mr. Dorsey: We are always entitled to show the connection, the association, the friendship or lack of friendship, the prejudice, bias or lack of prejudice and bias, of the witness, your Honor, You permitted them, with Conley, to go into all ~~kinds~~ of proposals to test his memory and to test his disposition to tell the truth, etc. Now, I want to lay the foundation for the impeachment of this witness by this man Gantt to whom he did make these complaints.

~~The Court: Well, I rule it all out.~~

Mr. Arnold: It is the most unfair thing I have ever heard of, to try to inject in here in this illegal way, this kind of evidence, any man ought to know that it is illegal. It has no probative value, and has been brought in here by this miserable negro and I don't think any sane man on earth could believe it. It is vile slander and fatigues the indignation to sit here and hear things like this suggested, things that your Honor and

everybody knows are imcompetent.

The Court: Well, I sustain your objection.

Mr. Arnold: If the effort is made again, your Honor, I am going to move for a mistrial. No man can get a fair trial with such inuendoes and insinuations as these made against him.

The Court: Have you any further questions, Mr. Dorsey?

Mr. Dorsey: That is all I wanted to ask him. I will bring Gantt in to impeach him.

The Court: Well, I have ruled that all out.

Mr. Dorsey: Well, we will let your Honor rule on Gantt too.

The assertion by the solicitor that this witness did make the suggested complaints to Gantt, the insinuations involved in the questions of the solicitor that Frank had committed disgraceful and prejuducial acts with the witness and the final assertion of the solicitor when the Court ruled it out that he would introduce Gantt and let the Court rule on Gantt too, was highly prejudicial to the defendant. The Court erred in permitting the solicitor to make the insinuations and to indulge in the threat that he would let the Court rule on Gantt too, in the presence of the jury and without any rebuke on the part of the Court. The Court erred in not formerly withdrawing these insinuations and assertions from the jury and in not of his own motion severaly rebuking the solicitor for his conduct. The mere ruling out of the testimony was not sufficient. Nothing but a severe rebuke to the Solicitor General would have taken from the jury the sting of the insinuations and threats of the solicitor.

34. Because, while Mrs. Freeman was on the stand, after testifying as to other things she testified that while she and Miss Hall, on April 26th, 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 conver-

sation 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 greates 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

35. 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, incompetent; that the National Pencil Co., 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 pay.

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.

36. Because the Court permitted, at the instance of the solicitor the witness Sig Montag, to testify over the objection of defendant, made at the time the testimony was offered that same was irrelevant, immaterial and incompetent, that he got the reports made on the crime by the Pinkertons and that they were made. That these reports came sometimes every day and then they did not come for a few days and then came again. That he practically got every day's report; that he got the report about finding the big stick and about the finding of the envelope, that he got them pretty close after they were made; that he knew about them having the stick and the envelope when he read the report. That he did not request Mr. Pierce, representing the Pinkertons, to keep from the police and the authorities the finding of the stick and the envelope.

The Court, over the objections of the defendant, on the grounds stated, permitted this testimony to go to the jury and in doing so erred.

This was prejudicial to the defendant because the solicitor insisted that the finding of the envelope and stick were concealed from the authorities.

37. Because the Court erred in permitting the witness Leech, a street car inspector, at the instance of the solicitor and over the objections of the defendant that same was irrelevant, immaterial, and incompetent, to testify that he had seen street car men come in ahead of their schedule time. That he had seen that often and had seen it last week. That he, Leech, had suspended a man last week for running as much as six minutes ahead of time. That he suspends them pretty well every week and that he suspends a man for being six minutes ahead of time just like he would for being six minutes late. It frequently happens that a street car crew comes in ahead of time and that they are given demerits for it and that he sometimes suspends them for it. That the street car crews are relieved in the center of town; that sometimes a crew is caught ahead of time when they are going to be relieved. That it is not a matter of impossibility to keep the men from getting ahead of time, although that does happen almost every day. That there are some lines on which the crew does not come in ahead of time because they cannot get in.

It frequently happens that the English Ave., car cuts off the River car and the Marietta car. It often happens that these cars are cut off. That when there is a procession or anything moving through town, it makes the crew anxious to get through town, that they are punished just as much for coming in ahead of time even a day like that as they would be any other day. They do their best to keep the schedule, but in spite of it they sometimes get off.

The Court permitted this testimony of the witness Leech over the objection of the defendant that the same was irrelevant, immaterial and incompetent, and in doing so committed error.

This was prejudicial to the defendant, because the crew on the English Ave., car upon which the little girl, Mary Phagan, came to town, testified that she got on their car at ten minutes to twelve. That under their schedule they should reach the corner of Broad and Marietta Street at 7-1/2 minutes past twelve. That they were on their schedule time on April 26th and did reach that place at 12-07 or 12:07-1/2. What other crews did at other times or even what this crew did on other occasions was wholly immaterial and in no way illustrated just what took place on the trip wherein Mary Phagan came to town. That other crews often came in ahead of time or that this particular crew often came in ahead of time was wholly immaterial.

38. Because during the examination by Mr. Arnold counsel for the defendant, of V. H. Kreigshaber a witness for the defendant, there was laughter in the audience, sufficiently generally distributed throughout the audience and loud enough to interfere with the examination. The testimony elicited from Kreigshaber was that Frank was a young man, and that Kreigshaber was older, but he didn't know how much older. Mr. Arnold called the Court's attention to the interruption for the purpose of obtaining some action from the Court thereon.

The Court stated that if there was other disorder no one would be permitted in the court room on the following day and requested the Sheriff to maintain order.

The defendant says that the Court erred in not then taking radical steps to preserve order in the court room and to permit the trial to proceed orderly and that a threat to clear the court room upon the following day and the request for the Sheriff to keep order was not sufficient for the purpose.

This was prejudicial to the defendant because the laughter was directly in derision of the defendant's defense being made by his counsel.

39. Because the Court permitted, at the instance of the Solicitor, the witness Hilton Klein to testify, over the objection of the defendant made when the evidence was offered that the same was immaterial, as follows:

"When the witness Conley was brought to the jail Mr. Roberts came to the cell and wanted Frank to see Conley. I sent word through Mr. Roberts that Frank didn't care to see him. Mr. Frank knew that the detectives were down there and afterwards they brought Conley up there and of course Mr. Frank knew he was there. I knew and Mr. Frank knew he was there. Mr. Frank was at once side and I acted as spokesman. Mr. Frank would not see any of the city detectives. Frank gave as his reason for refusing to see Conley with the detectives that he would see him only with the consent of Mr. Rosser, his attorney. I do not know whether Mr. Frank sent and got Mr. Rooser or not. I told the detectives about sanding and getting Mr. Rosser's consent. I think Mr. Goldstein was there and Scott and Black and a half dozen detectives, a whole bunch of them. I was there only once when Conley was there, that was the time when Conley sworn he wrote the notes on Friday. When Conley came up there with the detectives, Frank's manner, bearing and deportment were natural. He considered Conley in the same light he considered any other of the city detectives. I know that because I conferred with him about it and he said he would not see any of the City detectives without the consent of Mr. Rosser; he considered Scott as working for the City at that time. I sent word that he would not receive any of the city detectives, Black or anyone of the rest of them. Frank considered Scott with the rest of them, including him with the city detectives. He would not see anyone of the city detectives and that included Scott. Frank did not tell me, that the inference was mine. Frank merely said he would receive none of the city detectives without Mr. Rosser's consent, that was the substance of his conversation. Mr. Roberts came up and announced the city detectives; this was at Frank's cell in the county jail.

The court permitted this testimony to go to the jury over the objections made as above stated, and in doing so committed

This was especially prejudicial to the defendant, because the solicitor, in his argument to the jury stressed and urged upon the jury that this failure of the defendant to, as he expressed it, face this negro Conley and the detectives, even in the

absence of his own counsel, was evidence of guilt.

(jj). Because the court permitted Miss Mary Pirk to be asked the following questions and to make the following answers on cross examination made by the Solicitor.

Q. You never heard of a single thing immoral during that five years-- that's true? (Referring to the time she worked at the Pencil Factory)

A. Yes sir, that's true.

Q. You never knew of his (Frank's) being guilty of a thing that was immoral during those five years--is that true?

A. Yes sir.

Q. You never heard a single soul during that time discuss it?

A. No sir.

Q. You never heard of his going in the dressing rooms there of the girls?

A. No sir.

Q. You never heard of his slapping them as he would go by?

A. No sir.

Q. Did you ever see Mr. Frank go back there and take Mary off to one side and talk to her?

A. I never seen it.

Q. That never occurred?

A. I have never seen it.

Q. You never heard about the time that Frank had her off in the corner there, and she was trying to get back to her work?

A. No sir.

Q. You didn't know about that?

A. No sir.

Q. That was not discussed?

A. No sir.

These questions were asked over the objection of the defendant, because even if the Solicitor's questions brought out that the witness had heard charges of immorality against Frank, that her answers there about would have been irrelevant and immaterial in this trial of Frank for murder. The fact that Frank might have been frequently guilty of immorality could not be held against him on a trial for the murder of Mary Phagan. Nor,

could acts of immorality with women be heard, even on cross examination, as evidence of bad character, and reputation, upon Frank's trial for the murder of Mary Phagan.
Lasciviousness is not one of the character traits involved in a case of murder and can not be heard in a murder trial, even when the defendant has put his character in issue.

41. Because the Court permitted the witness W. D. McWorth to testify, at the request of the Solicitor General, over the objection of the defendant made at the time the testimony was offered, that the same was immaterial.

". Mr. Pierce is the head of the Pinkerton office here. I do not know where he is; the last time I saw him was Monday evening, I do not know where Mr. Whitfield is (Mr. Whitfield was also a Pinkerton man) I saw him the last time Monday afternoon. I do not know whether Pierce and Whitfield are in the City or not."

The Court admitted this testimony over the objections of the defendant, made at the time the testimony was offered, for the reasons stated and in so doing committed error. This was especi ally prejudicial to the defendant. Pierce and Whitfield were part of the Pinkertons force in the City of Atlanta, and the inference of the solicitor was that he wished their whereabouts to be shown upon the theory that the Pinkertons were employed by Frank for the National Pencil Company and that a failure on the part of Frank to produce them would be a presumption against him, as he stated it, upon the well-known principle of law that if evidence is shown to be in the possession of a party and not produced, it raises a presumption against them.

42. Because the Court permitted Mc Worth, 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 [illegible] 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. Perce."

96.

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.

43 (OO) Because the Court permitted the witness Irene Jackson, at the instance of the solicitor General and over the objection of the defendant, that the testimony was irrelevant, immaterial, illegal to testify as follows:

Q."Do you remember having a conversation with Mr. Starnes about something that occurred.

A. Yes sir.

Q. Now what was that dressing room incident that you told him a bout at that time?

A. I said she was undressing.

Q. Who was undressing?

A. Ermilie Mayfield, and I came in the room, and while I was in there, Mr. Frank came to the door.

Q. Mr. Frank came in the door?

A. Yes sir.

Q. What did he do?

A. He looked and turned around and walked out.

Q. Did Mr. Frank open the door?

A. Yes, he just pushed it open.

Q. Pushed the door open?

A. Yes sir.

Q. And looked in?

A. Yes sir.

Q. And smiled?

A. I don't know whether, I never notice to see whether he smiled or not,, he just kind of looked at us and turned around and walked out.

Q. Looked at you, stood there how long?

A. I didn't time him; he just came and looked and turned and walked out.

Q. Came in the dressing room?

A. Just came to the door.

Q. Came into the door of the dressing room?

A. Yes.

Q. How was Miss Ermilie Mayfield dressed at that time?

A. She had off her top dress, and was holding her old dress in her hand to put it on.

Q. Now, you reported that to the forelady there?

A. I did not but Ermilie did.

Q. Now did you talk or not to anybody or hear of anybody except Miss Ermilie Mayfield talking about Mr. Frank going in the dressing room before there when she had some of her clothes off?

A. I have heard remarks but I don't remember who said them, or anything about it?

Q. (By Mr. Rosser) Was that before April 26th?

A. Yes sir.

Q. Well, what was said about Mr. Frank going in the room, the dressing room?

Q. I don't remember.

Q. Well, by whom was it said?

A. I don't remember.

Q. Well, how many girls did you hear talking about it?

A. I don't remember I just remember I heard something about it two or three different times, but I don't remember anything about it, just a few times.

Q. Was that said two or three different times?

A. I said a few times, I said two or three times.

Q. How would the girls--- she said she heard them talking about Mr. Frank going in the dressing room on two or three different occasions--well, you know you heard them discussing about his going in this dressing room on different occasions, two or three different occasions did you?

A. Yes.

Q. That is what you said, wasn't it?

A. Yes sir.

Q. Now when was it that he run in there on Miss Ermilie Mayfield?

A. It was the middle of the week after we had started to work, I don't remember the time.

Q. The middle of the week after you had started to work?

A. Yes sir.

Q. Was that the first time you ever heard of his going in the dressing room, or anybody?

A. Yes,

Q. That was the first time?

A. Yes sir.

Q. Then that was reported to this forelady?

A. Yes sir.

Q. Then when was the second time that you heard he went in there?

A. He went in there when my sister was lying down.

Q. Your sister was lying down, in what kind of position was your sister?

A. She just had her feet up on the table.

Q. Had her feet up on the table?

A. Had them on a stool, I believe, I don't remember.

Q. A table or stool?

A. Yes sir.

Q. Was she undressed or dressed?

A. She was dressed.

Q. She was dressed; do you know how her dress was?

A. No sir, I didn't look.

Q. You don't know that, you were not in there?

A. Yes sir, I was in there, but I didn't look.

Q. Well, now what did Mr. Frank do that time?

A. I didn't pay any attention to it, only he just walked in and turned and walked out, looked at the girls that were sitting in the window, and walked out.

Q. What did the girls say about that?

A. Don't remember.

Q. Did they talk about it at all?

A. There was something said about it, but I don't rmemeber.

Q. Well now, did you or not hear them say that he would go in

that room and stand and stare at them?

A. Yes sir, I have heard something, but I don't remember exactly.

Q. You heard that, how often did you hear that talked?

A. I don't remember.

Q. You don't remember how often you heard them say he walked in there and stood and stared at them?

A. I don't remember.

Q. You don't remember that; well now, you said about three times those things occurred, and you have given us two, Miss Mayfield and yoursister, what was the other occasion?

A. Miss Mamie Kitchens.

Q. Miss Mamie Kitchens?

A. Yes sir.

Q. Mr. Frank walked in the dressing room on Miss Mamie Kitchens?

A. We were in there, she and I.

Q. You were in there and Mr. Frank came in there?

A. Yes sir.

Q. So that was the three times you know of yourself?

A. Yes sir.

Q. Then did you hear it talked of?

A. I have heard it spoken of, but I don't remember.

Q. You have heard them speak of other times when you were not there, is that correct?

A. Yes sir.

Q. How many times when you were not there? That is three times you saw him, how many times did you hear them talk about it when you were not there?

A. I don't remember.

Q. What did they say Mr. Frank did when he could come in that dressing room?

A. I don't remember.

Q. Did he say anything those three times when you were there?

A. No sir.

Q. Was the door closed?

A. It was pushed too, but there was no way to fasten the door.

Q. Pushed to but no way to fasten it?

A. No sir.

Q. He didn't come in the room?

A. He pushed the door open and stood in the door.

Q. Stood in the door, what kind of dressing room was that?

A. It was---just had a mirror in it, you mean to describe the inside?

Q. Just describe it, was it all just one room?

A. Yes sir, and there were a few lockers for the foreladies.

Q. A few lockers around the walls, a place where the girls changed their street dress and got into their working dress, and vice versa?

A. Yes sir.

Q. Now, what else did you ever see that Mr. Frank did except go in the dressing room and stare at the girls?

A. Nothing that I know of.

Q. When Mr. Frank opened the door, there was no way he could tell before he opened the door what condition the girls were in was there?

A. No sir.

A. (by Mr. Arnold) He didn't know they were in there, did he?

A. I don't know.

Q. That was the dressing room and the usual hour for the girls to attend the dressing room, wasn't it?

A. Yes sir.

Q. Undressing and getting ready to go to work?

A. Yes sir.

Q. Changing their street clothes and putting on their working clothes, that is true, Miss Jackson?

A. Yes sir.

Q. That was the usual hour; you had all registered on or not, before you went up into this dressing room?

A. Yes sir.

Q. And Mr. Frank knew the girls would stop there?

A. Yes sir.

Q. After registering?

A. Yes sir.

Q. Now, did you hear or not any talk about Mr. Frank going around and putting his hands on the girls?

A. No sir.

Q. Was that before or after he had run in the dressing room?

A. I don't remember.

Q. Well, he pushed the door open and stood in the door, did he?

A. Stood in the door.

Q. Looked in and smiled?

A. Yes sir.

Q. Ddin't you say that?

A. I don't remember now, he smiled or made some kind of a face which looked like a smile, like smiling at Ermilie Mayfield.

Q. At Ermilie Mayfield, that day she was undressed?

A. But he didn't speak, yes sir.

Q. He didn't say a word, did he?

A. No sir.

Q. Did he say anything about any flirting?

A. Notto us, no sir.

These questions and answers were objected to for the reasona above stated, and for the further reason that a statement showing improper conduct of Frank in going into the dressing rooms with girls, while improper, was intended to create prejudice against him and in no way elucidated the question as to whether he was or was not the murderer of Mary Phagan.

Movant contends that the fact that the defendant had put his character in issue is no reason why reported or actualfacts of immorality should be admitted in evidence over his objection. The defendant's reputation or character for immorality or loose conduct with women are not relevant subjects for consideration in determining whether the defendant has or has not a good character when such good character is considered in connection with a charge for murder.

44. (pp) Because the court permitted the solicitor to ask and have answered by the witness Harlee Branch the following questions, said questions and answers dealing with an incident occurring at the Pencil Factory, wherein Conley, after having made the third affidavit in the record purported to reenact the occurrence between himself and Frank on April 26th, wherein the body

of Mary Phagan was taken from the office floor to the cellar of the factory;

Q. Now, Mr. Branch, take this stick and that picture, and take up Conley now, and give every move he made?

A. Am I to give you the time he arrived there? (Pencil Factory)

Q. Yes, give the time he arrived.

A. I will have to give that approximately; I was to be there at 12 o'clock, and I was a few minutes late, and Conley hadn't arrived there then, and we waited until they brought him there, which was probably ten or fifteen minutes later, the officers brought Conley into the main entrance here and to the staircase, I don't know where the staircase is here--- yes, here it is, (indicating on diagram) and they carried him up here, and they told him what he was there for, and questioned him, and made him understand that he was to re-enact the pantomime.

Q. Just tell what Conley did?

A. After a few minutes conversation a very brief conversation, Conley led the officers back here and turned off to his left to a place back here, I guess this is it (Indicating on diagram) right where this is near some toilets, and he says:

Q. Go ahead?

A. He was telling his story as he went through there, and he said when he got up there, he went back and he said he found this body back in that place.

Q. Go ahead and tell what he said and did?

Q. He was talking constantly all the time, I don't know how he made out a part of his story.

Q. Go ahead now, and state what Conley did and said as he went through that factory?

A. Well when he got back--After reaching this point at the rear left side of the factory, described the position of the body, as he stated it, he stated the head was lying towards the north and the feet towards the south, as indicated, and there was a [illegible] around the

Q. State what he said, what he said Mr. Frank did and said?

A. He didn't state how long it took for the various movements.

Q. (By the Court) Did you time it?

A. No sir, I know the time I arried there and the time I left the factory.

Q. First, I want you to state what he said he did, and what he said Mr. Frank did, and then come up on the time business?

A. I don't quite understand what I am to do.

Q. Just go ahead and tell what Conley said he said, and what Conley said Mr. Frank said, and show what Conley did the day you were over there, take it up right back here where the body was and go on with it, leaving out, however, what he said about the cord and all that?

A. He said when he found the body, he came up to Mr. Frank, called to him from some point along here, I should judge (indicating on diagram), I don't understand this diagram exactly, and told him the girl was dead, and I don't know just exactly what Mr. Frank said, I will try to eliminate as much of that conversation as I can. Anyhow he said he came on up to where Mr. Frank was, and that he was instructed to go to the cotton room, where he showed us. I don't know, it must be on the same side of the building, about here, I judge, (indicating) and he went in there, he showed us the cotton room, and he said he went back, and he did go back, lead us back, and told about taking up the body, how he brought it on up on his shoulder, and then in front of a little kind of impression of the wall, said he dropped it, and he indicated the place, and then he came up and told Mr. Frank about it, that he would have to come and help him, or something like that, and that Mr. Frank came back and took the feet, I believe, he said, and he took the head, and they brought the body up to the elevator and put it on the elevator.

Q. (By the Court) Was he going through all that thing?

A. Yes sir, he was enacting this all the time, and talking all the time, He. described how the body was put on the elevator, and he said Mr. Frank run the elevator down, and he went on down the elevator.

Q. (By the Court) Did he go down in the elevator?

A. On this trip, yes sir, he went down in the elevator to the basement, and he said Mr. Frank helped to take the body out, and they dropped it there, and Mr. Frank told him to take it up

and carry it back, and he put the body on his shoulder and carried it back to this sawdust which is away back here, and that he came on back and there was somethings in here which he said he threw on this trash pile, and Mr. Frank was up, he said, in the cubby hole, he said, somewhere back there, and later he lead us up there, and that Mr. Frank told him to run the elevator up, so Conley and the officers and the rest of us who were with him came up on the elevator, and when they got to the first floor, just before getting to the first floor, he said this was where Mr. Frank got on the elevator, Mr. Frank was waiting there for him; then they brought the elevator on up to the second floor, and he had them to stop the elevator just, I suppose, a foot, or a little more below the landing, and he said Mr. Frank jumped off when the elevator was about that point, and after getting up, he said Mr. Frank went around the elevator to a sink that he showed us back of the elevator, to wash his hands, and he waited out in front, and he said he shut off the power while Mr. Frank was gone around there, and when Mr. Frank came back they went in the office, and he lead us on in the office through---there is an outer office there, and he come in this way, and come through in this office back there, this inner office, and he indicated Mr. Frank's desk and a desk right behind it, I presume this is the two desks (indicating) that Mr. Frank sat down in the chair at that desk, and he told him to sit at this other desk, and Mr. Frank told him to write some notes, and he was asked by some of the officers to write what Mr. Frank had told him to write, and he sat down there and wrote one note, and I believe--I know he wrote one note, and I don't know whether he wrote one or two, and that Mr. Frank handed him some money and ~~that later he took it back~~, and I don't remember whether he gave him the cigarettes and money before or after this, I don't recall, Any way, when he was in here, after he had written the notes for the officers, I found it was time for me to get in the office with my copy, he hadn't finished, he was still sitting there, and I telephoned into the office for relief, someone to relieve me, and I went to the office, and I left him there in this office, and I went in.

Q. What time was it when Conley got there?

A. I should judge it was about a quarter past twelve, I didn't look at my watch.

Q. A quarter past twelve, what time did you get there.

A. I must have gotten there five minutes before he did.

Q. Then what time did you leave?

A. I left about one o'clock.

A. What time did he begin?

A. They rushed him right up the steps and probably two or three minutes after he got up there, he began this enactment, and he went very rapidly, in fact, we sort of trot to keep behind him.

Q. You say you did keep behind him, were any questions asked him during that?

A. Constantly, yes sir.

Q. How many people were asking him questions.

A. Well, I suppose four or five of the officers.

Q. How much of the talking that Conley did have you cut out?

A. Well, I have cut out a good deal, I have no way of indicating how much.

Q. Well did he do or not more talking than you have stated.

A. Agreat deal more.

Q. A great deal more? How much more would you say.

A. I have no way of estimating, he was talking constantly, except when he was interrupted by questions.

Q. Now, Mr. Branch, do you know the amount of time that Conley spent in this? First, you say you got there at a quarter past twelve, did you.

A. I didn't time it, but it must have been, because I was endeavoring to get there at twelve o'clock, and when I got to the office from police station, it was five or ten minutes after twelve, and I walked down just about a block and a half.

Q. And Conley got there at what time?

A. He came just, I should say, five minutes after I did, not longer than five minutes.

Q. Not longer than that, and he got there at 12:20, then, and what time did you go away?

A. I left a little after one.

Q. How much after one?

A. I do not know, probably five or ten minutes.

Q. One-ten then, now, how much of the time during that time you were there did it take Conley to act what he acted, leaving out the conversation he had with the different men?

A. That would be a difficult thing for me to estimate, while he was acting, he was acting very rapidly, he kept us on the run.

Q. All right, now, leave out now the time that it took this man to answer the questions that were put to him by yourself and other men that accompanied him through there, leave that out now and give us your best opinion as to how long it took Conley to go through that demonstration?

A. There was no way to do that, there was no way to disassociate the time, and find out the difference between the two, between the time he was acting and talking; I didn't attempt to do that; in fact, the only time I was interested in was the time I would have to get back to the office.

Q. You got to the office, you say about 1:10?

A. Yes sir.

Q. What time then, you say, about, you left the Pencil Factory ?

A. I left the Pencil Factory between five and ten minutes after one.

Q. You left the Pencil Factory then at about 1:10?

A. Yes, between 1:05 and 1:10

The defendant objected to this testimony, because(a) this so-called experiment made with Conley was solely an effort upon his part to justify his story, (b) the sayings and acts of Conley, testified about as aforesaid were the sayings and acts of Conley, not under oath, had and made without the right of cross examination, the net result of which is but a reptition of Conley's story to the jury, without the sanction of an oath, and without cross examination. That Conley immediately after making his last affidavit; that that last affidavit is not the way he tells the story on the stand; that he tells it wholly differently on the stand: at least differently in many particulars, that it cannot help the jury for Conley

to go and illustrate that affidavit when he says now on the stand that much of it was a lie, and that it did not happen that way at all; that this evidence was of another transaction, not binding on this defendant.

45. Because the Court declined to allow Dr. David Marx to give testimony in behalf of the defendant as to the character of the Jewish organization known as B'Nai Brith. Defendant's counsel stated at the time that Dr. Marx would testify that while the B'Nai Brith was an international Jewish charitable organization, its charity did not extend to giving aid to persons charged with a violation of the criminal law, as was Mr. Frank in this case.

The State objected to permitting Dr. Marx to make the answer sought, and the Court declined to permit the testimony to go to the jury.

46. Because the Court permitted the witness Mrs. J. J. Wardlaw, who before her marriage was Miss Lula McDonal, to be asked by the solicitor General the following questions and to make the following answers:

Q. You never knew of his improper relations with any of the girls at the factory?

A. No, sir.

Q. Now, did you ever, do you know or did you ever hear of a girl who went with Mr. Frank on a street car to Hapeville the Saturday before Mary Phagan was murdered?

A. No sir.

Q. On the same street car with Hermes Stanton and H. M. Baker and G. S. Adams.?

A. No sir.

Q. And about his putting his arm around her and trying to get her at various places to get off with him?

A. No sir.

Q. And go to the woods with him?

A. No sir.

Q. She was a little girl that got on at the corner of Forsyth and Hunter etc [illegible] where the car passes?

A. No, I don't know that.

Q. You never heard of it at all?

A. No sir.

Q. The Saturday before?

A. No sir.

Q. You say you have never heard of any act of immorality on the part of Mr. Frank prior to April 26, 1913?

A. No sir, I did not.

Q. You never talked with Hermes Stanton or H. M. Baker, the conductor or motorman?

Q. I will put it that way then you never heard that, the Saturday before little Mary Phagan met her death, Mr. Frank went out on the Hapeville car on which Hermes Stanton and H. M. Baker were in charge, and that he had his arm around the little girl, and that he endeavored at various places to get that little girl to get off the car and go to the woods with him?

A. No sir.

Q. You never heard such a statement as that at all by anybody?

A. No sir, I did not.

The defendant objected to the above questions made by the solicitor General, because while the witness denied any knowledge by hearsay or otherwise of the wrong asked about, the mere asking of such questions, the answers to which must have been irrelevant and predjudicial was harmful to the defendant, and the court erred in permitting such questions to be asked, no matter what the answers were.

The court further erred because, although the defendant had put his character in issue, the state could not reply by proof or reputation of improper or immoral conduct with women. The reputation for lasciviousness is not involved in that general character that is material where the charge is murder.

47. (ss). Because the court permitted the witness W. E. Turner at the instance of the Solicitor and over the objection of the defendant made at the time the evidence was offered that same was irrelevant, immaterial and dealt with other matters than the issues involved, to testify:

" I saw Frank talking to Mary Phagan on the second floor of the factory about the middle of March. Frank was talking to her in the back part of the building. It was just before dinner I don't know whether anybody was in the room besides Mr. Frank and Mary. After I went in there two young ladies came down and

showed me where to put the pencils. Nobody was in there but Mr. Frank and Mary at the time I went in there. Mary was going to her work when Mr. Frank stopped to talk to her. Mary told him that she had to go to work. Mr. Frank was talking about he was the Superintendent of the pencil factory. He told her that he was the Superintendent of the pencil factory and that he wanted to speak to her and she told him she had to go to work and I never did hear any more replies from either one. I left just when she told him that she had to go to work. Mary backed off and Frank went on towards her talking to her. That was before I left, was when she backed off, and the last words I heard him say was he wanted to talk to her. Mary did not stand still, she moved backward about 3-1/3 feet. While she was going backwards, Mr. Frank was talking to her and walking towards her. Mr. Frank said 'I am the Superintendent of the pencil factory and I want to speak to you' and Mary said, "I have got to go to work."

The court over the objections made as is above stated, permitted this testimony to go before the jury and in so doing committed error, for the reasons above stated.

This was prejudicial to the defendant, because the transaction testified about was a transaction distinct from those making the issues in the present case, threw no light on that trial and tended to prejudice the jury against Frank upon the theory that he was seeking to be intimate with this little girl.

48. Because the Court erred in admitting to the jury, over the objection of defendant's counsel, made at the time the evidence was offered that the same was irrelevant, immaterial, dealt with collateral matters to the confusion of the issues on trial, the following extracts from the minutes of the Board of Health of the State of Georgia:

" The president then addressed the Board at length on his reasons for thinking that the Secretary should be requested to resign, the subjects dealt with being too enormous and too lengthy to be included here in their entirety. After the President's address, the Board adjourned and reassembled again at four o'clock in the afternoon at which time Dr. Harris' side of the controversy was heard." 110.

"The President (of the Board Dr. Westmoreland) then addressed the Board at length on his reasons for thinking that the Secretary should be requested to resign the subjects dealt with being too numerous and too lengthy to be included here in their entirely. After the President's address, the Board adjourned and reassembled again at four O'clock in the afternoon, at which time Dr. Harris' side of the controversy was heard."

" The Secretary not having been present at what transpired following this was not in a position to take note as to the proceeding, but was informed by the members on adjournment that it was their wish that he should still continue as Secretary and Director of the Laboratory."

"The President then made a short statement in support of his protest against the Secretary, and reiterated some of the charges made at the previous meeting, and in addition, made objection against the Secretary's action in sending out antitoxine No. 64, which had been shown by tests made in Washington to be of less potency than it was originally labelled and also condemning the Secretary for replacing Dr. Paullin and personally taking up the investigation of the malarial epidemic around the pond of the Central of Georgia Power Company. The President then stated that he would publish the charges against the Secretary if the board did not take such action regarding them as he thought right and proper. At the conclusion of the President's address, a talk was made by Mr. Daughty, in which he took exception to the former's attitude, and insisted--"

" At the conclusion of the President's address a talk was made by Mr. Doughty, in which he took exception to the former's attitude, and insisted that every member of the Board wished to do what was best for the State Board of Health and the people of Georgia, and that everyone connected with the Board of Health should be willing to bow to the decision of this body. He deprecated strongly the idea of giving to the press charges the publication of which could do no good. and which could only result in harm".

" On the President and Secretary being recalled an hour later, the President pro tem. Dr. Benedict, read the following resolu-

tion, which had been unanimously adopted by the Board on motion of Dr. Harbin, seconded by Dr. Brown:---the resolution having been drawn by a committee appointed by the Board, consisting of Drs. Benedict, Taylor and Doughty."

" That the committe appointed to frame a resolution expressing the opinion of the Board with regard to the charges preferred against the Secretary by the President of the Board in a report to the Governor, and upon which they are called upon to act., beg to report as follows:

" Resolved: That the members of the Board present after carefully considering the charges and all evidence in its possession, unanimously agree that while there have been certain slight irregularities in the conduct of some departments of the laboratories of the State Board of Health, which should be corrected, these irregularities have not been so important in character or result as to call for or warrant the discontinuance of Dr. Harris as Secretary and director of laboratories as demanded by the President. The Board further directs that a copy of this resolution be transmitted to the Governor.

Following the reading of this resolution, Dr. Westmoreland tendered his resignation as President of the Board, a copy of which follows:

Atlanta, Ga. Sept., 25th, 1911.

To the Members of the Georgia State Board of Health: Atlanta, Ga., Gentlemen:- I hereby tender you my resignation to take effect at this meeting. Thanking you for the courtesies extended me, and for the honor conferred on me in the past, I am, Very sincerely yours. W. F. Westmoreland, President."

"Now on page 164 and 165: that is the letter to the Governor, adopted by the Board, and sent to his Excellency, John M. Slaton Governor, Atlanta, Ga. "

The Court admitted these extracts from the minutes over the objections of defendant, as above stated, and in so doing committed error for said reasons.

This was prejudicial to the defendant and took the minds of the jury from the issues on the trial and centered them upon a medical row had between Dr. Westmoreland who had once been

President of the State Board of Health and Dr. Harris who had been and was its Secretary. This row between the doctors stated is utterly immaterial and irrelevant and was harmful to the defendant because it tended to discredit the testimony of Dr. Westmoreland who resigned from the Board and to sustain the testimony of Dr. Harris who remained as Secretary of the Board after Dr. Westmoreland's resignation.

49. Because the court permitted the witness E. H. Pickett to testify over the objection made when the testimony was offered that it was wholly and entirely irrelevant, immaterial incompetent, illegal dealt with transactions between other parties, threw no light on the issues involved and did not bind the defendant, to testify:

"Minola McKnight at first denied that she had been warned by Mrs. Selig when she left to go to the solicitor's office on May 3rd not to talk about the case, that when asked she stated that she was on that date instructed not to talk. At first, Minola said her wages had not been changed by the Seligs, that she was receiving the same wages as before the crime. At first she said her wages hadn't been changed and then she said her wages had been raised, just what I can't remember because it varied from one week to another; she said the Selig family had raised her wages. The only statement she made about Mrs. Frank giving her a hat was when she made the affidavit, we didn't know anything about the hat before."

The Court permitted this testimony to go to the jury over the objections above stated and therein erred. The Court stated that he admitted this testimony on the idea that the ground of impeachment for Minola McKnight had been laid.

This testimony was prejudicial to the defendant, because the Court in admitting it, left the jury to consider the statements of Minola McKnight, that Mrs Selig had instructed her not to talk, that the Seligs since the crime had raised her wages; that Mrs. Frank had given her a hat.

50. Because the court permitted the witness J. H. Hendricks to testify, at the instance of the solicitor and over the objection of the defendant that the same was irrelevant, incompetent and immaterial, that;

". I am a motorman for the Georgia Railway and Power Company, running on April 26, 1913, on Marietta to Stock Yards and Decatur street car. The Cooper and English Ave., run is on the same route from Broad and Marietta Street to Jones Ave., Prior to April 26, 1913, the English Ave. car with Mathes and Hollis on it did run to Broad and Marietta streets ahead of time, how much ahead I cannot say positively. About April 26th and subsequent thereto Mathes and Hollis, in charge of the English Ave car, about twelve o'clock when they were due to get off at dinner did come in ahead of time. I have seen them two or three minutes ahead of time. At the time they were relieved, I got to Broad and Marietta Streets about 12:06. When I would get there on schedule time, I don't know where Mathes and Hollis were, they should have been coming in. When Hollis would be at the corner of Broad and Marietta Streets, and his car would not be there, and my car would be on time, Hollis would leave Broad and Marietta street for dinner on my car."

The Court permitted this testimony to go to the jury over the objections above stated and in doing so committed error for the reasons stated. Movant contends that this was prejudicial to the defendant because it was a material matter to determine at what time his car got to Marietta and Broad Streets on the day of the murder, and it confused and mislead the jury to hear testimony as to when he got there upon days other than the day of the murder.

51. Because the court permitted the witness J. C. McEwen, at the instance of and over the objection of defendant that the same was immaterial, incompetent and irrelevant, to testify: "I am a street car motorman, previous to April 26th I ran on the Cooper street route something like two years. On April 26th, 1913 I was running on Marietta and Decatur Streets. The Cooper street car or English Ave., car run by Hollis and Mathis was due in town at seven minutes after the hour; the car I was running was due at 12:10. The White City car got into the center of town at five minutes after the hour. About April 26, 1913, the Cooper Street car or English Ave., car frequently cut off the White City car due in town at 12:05. The White City car is due there before the English Ave., car, it is due five minutes after

the hour and the Cooper Street car is due seven minutes after the hour. In order for the English Ave., car to cut off the White City car, the Cooper Street car would have to be ahead of time, that is the English Avenue car would have to be ahead of time. If the White City car was on time at 12:05, the English Ave, car would have to get there before that time to cut it off. That happens quite often. I do know that the car that Mathis and Hollis were running did come into town ahead of time very often, especially if it is on a relief trip. I have known it to be four or five minutes ahead of time."

The Court admitted this testimony over the objections above made and in doing so committed error for said reasons. This was prejudicial to the defendant, because it was material to his defense to show, as sworn to by the conductor and motorman that the English Ave. car reached the corner of Broad and Marietta, Streets at 12;07 and it mislead the jury to admit evidence tending to show that at other times this same car run by Mathis and Hollis reached the City ahead of time. Nor would it be material for the purpose of contradicting the motorman who swore that he did not run ahead of time any time for whether he run ahead of time at other times would be immaterial, and a witness can be impeached only as to misstatements of fact material to the issues in the case.

52. Because the Court permitted, at the instance of the solicitor and over the objection of the defendant, made when the evidence was offered that same was irrelevant, immaterial and incompetent, the witness Henry Hoffman, to testify as follows:

" I am an Inspector for the Georgia Railway and Power Co., I know Mathis, the motorman who runs on the English Ave. car, He is under me a part of the day. He was under me on April 26th, from 11:30 A. M. to 12;07 P. M. Under the schedule, his car is due at the junction of Broad and Marietta Sts., at 12;07. Prior to the beginning of this trial, I have known Mathis car to cut off the Fair Street car. Under the schedule for the Fair St. car, it arrives in the center of town, junction of Broad and Marietta at 12;05. At the time Mathis was running ahead of this

Fair Street car which is due at 12;05 at the junction of Marietta and Broad Sts., the Fair street car would be on its schedule. I have compared my watch with Mathis' watch prior to April 26th, There was at times a difference of from 20 to 35 or 40 seconds. We are both supposed to carry the right time. When I compared my watch with Mathis' I suspect mine was correct, as I just had left it the day I looked at Mathis' watch, and mine was 20 seconds difference and I had gotten mine from Fred Williams that day. His watch was supposed to compare with the one at the barn. I called Mathis' attention to running ahead of time once or twice that I know of. Men coming in on relief time at supper and dinner, coming to the junction of Broad and Marietta, customarily come in ahead of time."

The Court admitted this testimony over the objections above made, and in doing so committed error for said reasons. This was prejudicial to the defendant, because it was material to his defense to show, as sworn to by the conductor and motorman that the English Ave., car reached the corner of Broad and Marietta Sts., at 12;07, and it mislead the jury to admit evidence tending to show that at other times this same car run by Mathis and Hollis reached the city ahead of time.

Nor would it be material for the purpose of contradicting the motorman who swore that he did not run ahead of time any time, for whether he ran ahead of time at other times would be immaterial, and a witness can be impeached only as to misstatements of fact, material to the issues in the case.

53. Because the Court permitted the witness J. W. 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:

" The clocks of the pencil company were 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.

54. 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.

55. 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 Kendricks 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.

56. Because the Court over the objection of the defendant made at the time the evidence was offered that the same was irrelevant, immaterial, incompetent, illegal and prejudicial to the defendant, permitted the witnesses, Miss Maggie Griffin, Miss

Myrtie Cato, Mrs. C. D. Donagan, Mrs. H. R. Johnson, Miss Marie Karst, Miss Nellie Petts, Miss Mary Davis, Mrs. Mary E. Wallace, Miss Carrie Smith and Miss Estelle Winkle to testify that they were acquainted with the general character of Leo M. Frank prior to April 26, 1913, with reference to lasciviousness and his relations to women and girls and that it was bad.

The Court admitted this evidence over the objections above stated, and in doing so erred for the reasons herein stated.

In determining general character in cases of murder, lasciviousness or misconduct with women is not one of the traits of character involved. The traits of character involved are peaceableness, gentleness, kindness, and it is utterly immaterial to prove bad character for lasciviousness in a murder trial.

To permit this evidence was highly prejudicial to the defendant. It attacked his moral character and while such attack would not tend to convict him of murder nor show him a person of such character as would likely commit murder, its introduction prejudiced the jury against him.

57. Because the Court permitted the witness Miss Dewie Hewell, over the objection of the defendant that the same was irrelevant, immaterial, incompetent, illegal and dealt with separate and distinct matters and issues from this case, to testify:

". I am now staying in the Station House. Before I came to Atlanta to testify I was in Cincinnati, Ohio, in the Home of the Good Shepard. I worked at the Pencil Company during February and March, 1913, I quit there in March. I worked on the fourth floor and worked in the metal room, too. I have seen Mr. Frank hold his hand on Mary's shoulder. He would stand pretty close to Mary when he would talk to her, he would lean over in her face."

The Court permitted this testimony over the objection of the defendant, made as is above stated, and in doing so committed error This was prejudicial to the defendant, because it was introduced to show an effort to be criminally intimate with Mary and inflamed and mislead the jury.

58. Because the Court permitted the witness, MissCato, 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 tc dispute the witness 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.

59. Because the Court erred in permitting the witness Maggie Griffin to testify over the objection of the defendant made when the 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.

60. Because the Court refused to give the following pertinent legal charge in the language requested:

"The jury are instructed that if under the evidence they believe the theory that another person committed this crime is just as reasonable and just as likely to have occurred as the theory that this defendant committed the crime, that then the evidence would not in a legal sense have excluded every other reasonable hypothesis than that of the prisoner's guilt and you should acquit him".

This request was submitted in writing and was handed to the

Court before the jury had retired to consider of their verdict and before the Court began his charge to the jury.

This request was a legal and pertinent one, particularly adjusted to the facts of the case and should have been given, and the Court in declining to give it committed error, although the general principle involved might have been given in the original charge.

61. Because the Court refused to give the following pertinent legal charge in the language requested:

" If the jury believe from the evidence that the theory or hypothesis that James Conley may have committed this crime is just as reasonable as the theory that the defendant may have committed this crime, then, under the law, it would be your duty to acquit the defendant."

This request was submitted in writing and was handed to the Court before the jury had retired to consider of their verdict and before the Court began his charge to the Jury.

This request was a legal and pertinent one, particularly adjusted to the facts of the case and should have been given, and the Court indeclining to give it committed error, although the general principle involved might have been given in the original charge.

62. Because the Court refused to give the following pertinent legal charge in the language requested:

" The jury are instructed that in all cases the burden of proof is upon the State. The State only half carries that burden when it establishes a hypothesis of guilt, but also leaves a hypothesis of innocence. If both theories are consistent with the proved facts, the very uncertainty as to which is correct requires that the jury shall give the benefit of the doubt to the defendant. But when the defendant relies upon circumstancial evidence, he is not obliged to remove the doubt. It is sufficient if he create a reasonable doubt. He is not obliged to prove his innocence. He may rely upon the failure of the State to establish his guilt. If the proved facts in the case establish a hypothesis consistent with the defendant's innocence and sufficient to create a reasonable doubt of his guilt,

this is sufficient to acquit him and it is not necessary that he should go further in his proof and exclude every possible idea of his guilt. No such burden is upon the defendant".

This request was submitted in writing and was handed to the court before the jury had retired to consider of their verdict and before the court began his charge to the jury.

This request was a legal and pertinsnt one, particularly adjusted to the facts of the case and should have been given, and the court in declining to give it committed error, although the general principle involved may have been given in the original charge

63. (jjj). Because the court declined to give the following pertinent legal charge in the language requested:

" No presumption can arise against the defendant, because of failure to cross examine any witnesses put up by the State, that the defendant was guilty of any particular acts of wrong doing. You should not, therefore, consider that this defendant because of such failure to cross examine any state's witnesses, has been guilty of any particular acts of wrong doing".

The above request was submitted to the court in writing before the jury retired to consider their verdict and before the charge was given to the jury.

The above is a correct statement of the law and applicable to the present issue, and the court erred in declining to give it.

The failure to give it was predjudicial to the defendant, for the reason that quite a number of character witnesses were introduced by the state and not cross examined by the defendant. The solicitor urged before the jury that this failure to cross examine was evidence of the fact that a cross examination would have brought out particular acts of wrong doing which would have affected the defendant's character.

64. (kkk)Because the court erred in declining to grant a mis - trial on motion of the defendant made by his counsel made after the argument of the Solicitor and before the charge of the court. The Motion made by defendant for a mistrial is as follows.

". I have a motion to make, Your Honor, for a mistrial in this case, and I wish to state the facts on which I base it,

and I wish the stenographer to take it down, and we propose to prove every fact stated in the motion unless the Court will state that he knows the facts and will take cognizance of them without proof.

First, that counsel requested before this trial began that the court room he cleared of spectators.

Second, when the Court declined to rule out the evidence as to the other alleged transactions with women, by Jim Conley. the audience in the court room, who occupied nearly every seat, showed applause by the clapping of hands and stamping of feet and shouting in the presence of the Court; the jury was in a room not over twenty feet from the court room--that room back there (indicating), and heard the applause. The Court refused to declare a mistrial or to clear the court room on motion of the defendant.

Third, that on Friday, August 22nd, when the trial was on and the court had just adjourned for the day, and the jury was about 200 feet from the court house proceeding north on Pryor street, as Mr. Dorsey, the Solicitor General, was leaving the court house, a large crowd assembled in front of the court house and, in the hearing of the jury, cheered and shouted "Hurrah for Dorsey" in the hearing of the jury.

Fourth, That on Saturday, August 23, 1913, while the trial was still on, and when the court adjourned and Mr. Dorsey emerged from the court room, a large crowd, standing on the street, applauded and cheered Mr. Dorsey,shouting "Hurrah for Dorsey", The jury at this time was in a cafe at lunch, about 100 feet away, and a portion of the crowd moved up in front of the cafe at which they jury were at lunch, and in the hearing of the jury shouted "Hurrah for Dorsey."

Fifth, on the last day of the trial, a large crowd, including many women, had assembled in the court room before court opened, taking up every seat in the court room. The jury were in their room not over 20 feet from the court room, and as Mr. Dorsey entered the room, the crowd applauded loudly by clapping of hands and stamping of feet, all in the hearing of the jury.

The court admonished the people that if the applause was repeated, he would clear the court room.

Now, we move upon those facts, which tend to coerce and intimidate and unduly influence this jury, that the court here and now declare a mistrial, and we stand ready to prove each and every fact there and we offer to prove them. Now, if your Honor will take cognizance of those facts as stated, then, of course it will dispense with proof. If your Honor does not take cognizance of them, we are ready to prove them by numbers of people who heard them, including myself; I have heard it, all of it, and the conduct has been most disgraceful. The defendant has not been accorded anything like a fair trial and I am disgusted, may it please Your Honor, with the unfairness of those members of the public who make such an exhibition of themselves when a man is on trial for his life. I am not afraid of them. I hope nobody else is afraid of them, but the natural tendency is to intimidate a jury, tocoerce a jury, and I have never seen a trial so hedged in and surrounded with manifestations of public opinion. I make the motion to declare a mistrial and stand ready to prove these facts. If the court knows them, the court can take cognizance of them.

Upon this motion the court stated that as to part of the facts he knew and part he did not know. that what occurred on August 25, 1913, the last day of the trial, he did know, as it took place in his presance; that he did hear cheering when Mr. Dorsey went out on the occasion mentioned, but as to what the crowd said, outside of the whooping and holloing, he did not know, and that he did hear the applause in the court room when the court declined to rule out the evidence as to several alleged transactions with women, by Jim Conley.

In support of this motion to declare a mistrial, the following evidence was introduced:

Mr. Deavours testified that he was a Deputy Sheriff of [illegible] in charge of the jury on Saturday when Mr. Dorsey was applauded in front of the court house as he left that house.

When the applauding begun, the jury was in or near the German Cafe, where they went to dinner. When the applause first begun,

they were about 100 feet from the court house, entering the Cafe. That he heard the applause but did not hear the crowd hollo "Hurrah for Dorsey: he heard the holloing and cheering and the jury could have heard what he did. That the applause he heard was outside of the Cafe, he did not hear the cheering from the inside of the Cafe. That he did not remember how many people came up in front of the Cafe. No one came in the Cafe into the room where the jury was, that is in the room in the rear.

Mr. Arnold testified: I wish to state that on Friday when court adjourned Mr. Dorsey left the court room and as he left the court room and as he left I heard loud cheering at the front. On Saturday, when court adjourned, I asked Mr. Dorsey not to go out until the jury had gotten away from where they could hear the noise of the crowd, for fear they should cheer him again as he left the court room. Mr. Dorsey said all right, and remained in the court room for a while. Finally, I thought the crowd had left, and I presume Mr. Dorsey thoughtthe crowd had left, and of course I do not claim that he is responsible for the cheering, but he finally left the court room and went out, and I went out with Mr. Rosser shortly afterwards, behind him. As Mr. Deavers says, it turned out that jury had not at that time entered the German Cafe, although I didn't see them. I saw people up there but I didn't know who they were, but as Mr. Dorsey left the court room there were loud and excited cheers and cries of "Hurrah for Dorsey". My judgment is that you could have heard the cheers and cries of "Hurrah for Dorsey" without any trouble, all the way from the court house up Alabama street; that is my opinion. They kept cheering him and as my friend went across the street the cries continued until he got clear into the Kiser Building. The first cheering was on Friday afternoon, but the second time was on Saturday when I asked Mr. Dorsey not to go out. I asked Mr. Dorsey not to go out until the crowd dispersed. He stayed in; I am not [illegible] for it. I didn't know the crowd was waiting out there, and I presumed the jury had gotten out of hearing but found they had not. I didn't hear the case mentioned; I heard no allusion to this case but I just heard cries of Hurrah for Dorsey, but on the other occasions--while I

love for my friend to meet all the approbation that he may get from the public, I did think that it was an outrage, the crying and shouting; that is what I thought. If the jury were where Mr. Deavours said they were, they could hear; no trouble about hearing it, if they had good ordinary hearing. On Friday I was in the court room when I heard most of the crying, I do not know where the jury was then.

Charles F. Huber, testified. I was in charge of the jury when they left the court room Friday afternoon. I do not know how far the jury had gotten before the crowd began cheering in front of the court house. I didn't know myself that they had cheered, until the next morning. They didn't know it at all. I had charge of the rear end of the jury. I have good hearing and I heard no cheering.

After the introduction of this testimony, Mr. Arnold for the defense stated that he desired time to examine Mr. Pennington and Mr. Liddell, the other two bailiffs in charge of the jury, who were then absent and asked the court to give him time to make the proof.

After the hearing of this request and the above evidence, the Court ruled: "Well, I am going to charge this jury on this case, and I will give you an opportunity, don't you understand, after wards, to complete your showing about that, but I will overrule the motion".

During the hearing of this motion for a mistrial and when the witness Charles F. Huber was on the stand and swore that he heard no cheering on the Friday afternoon referred to, and that the jury did not hear it, there was applause among the spectators, on account of the statement that the jury did not hear the cheering. Mr. Arnold called attention to the applause, stating to the court that the crowd could not be held in even while they were making this investigation.

The Court paid no further attention to this applause than to ask "what is the matter with you over there?"

In failing to grant the mistrial requested, the Court erred. The motion, taken in connection with the admitted and proven

facts, movant contends, clearly show that the defendant was not having a fair trial by reason of the great excitement of the crowd. The court room was in an exceedingly small building, on the ground floor, and was crowded during the whole of the trial and defendant contends that this prejudice and animosity of the crowd against him, as shown by the frequent applause, necessarily reached the jury box and prevented him from having a fair trial.

As permitted by the Court, in his order just aforesaid, we attach hereto in support of this motion for new trial the affidavits hereto attached, marked Exhibit J to AA, both inclusive, and said Exhibits are hereby made a part of this motion for new trial.

65. Because the defendant contends he did not have a fair and impartial trial, by an impartial jury, as provided by the Constitution and laws of this State for the following reasons, to-wit:

(a). On August 6, 1913, during the trial, the defendant's counsel moved to rule out the testimony of the witness Conley tending to show acts of perversion and acts of immorality on the part of the defendant, wholly disconnected with and disassociated from this crime. The Court declined to rule out said testimony and immediately upon the statement of the Court that he would let such testimony remain in evidence before the jury there was instant, pronounced and continuous applause throughout the crowded court room where the trial was being had, by clapping of hands and by striking of feet upon the floor.

While the jury was not then in the same room where the trial was being had, they were in a room about 50 feet from where the judge was sitting and about 20 feet from portions of the crowd applauding, and so close that perhaps the jury could have heard the applauding.

(b). And again during the trial, Mr. Arnold, one of the counsel for the defendant, in the presence of the jury, objected to a question asked by the solicitor, and the following colloquy took place:

Mr. Arnold: I object to that, your Honor, that is entering the orders on that book merely; that is not the question he is asking now at all.—

The Court: What is the question he is asking now?

(Referring to questions asked by the Solicitor General).

Mr. Arnold: He is asking how long it took to do all this work connected with it. (Referring to work done by Frank the day of the murder.)

The Court: Well, he knows what he is asking him. (Referring to the Solicitor General.)

Upon this suggestion of the court that the solicitor knew what he was doing, the spectators in the court room applauded by striking their hands together and by the striking of feet upon the floor, creating quite a demonstration. Defendant's counsel complained of the conduct of the spectators in the court-room. The court gave no relief except directing the Sheriff to find out who was making the noise.

(c). During the examination by Mr. Arnold, counsel for the defendant, of V. H. Kreigshaber, a witness for the defendant, there was laughter in the audience sufficiently generally distributed throughout the audience and loud enough to interfere with the examination. Mr. Arnold called the Court's attention to the interruption for the purpose of obtaining some action from the Court thereon.

The Court stated that if there was other disorder, no one would be permitted in the court room the following day and requested the Sheriff to maintain order.

(d). That during the trial, on Friday, August 22nd, 1913, when the court had just adjourned for the day, and the jury was about 200 feet away from the court house proceeding north on Pryor street, as Mr. Dorsey, the Solicitor General, was leaving the court room, a large crowd assembled in front of the Court house, and in the hearing of the jury cheered and shouted "Hurrah for Dorsey."

(e). That during the trial, on Saturday, August 23, 1913, when court adjourned and Mr. Dorsey emerged from the court room, a large crowd, standing on the street, applauded and cheered him, shouting "Hurrah for Dorsey". At that time the jury was between the court house and what is known as the German Cafe and near enough to the crowd to hear the cheering and shouting. A portion of the crowd moved up in front of the cafe at which the jury were at lunch, and in the hearing of the jury shouted "Hurrah for

Dorsey."

(f). On the last day of the trial, Monday, August 25th, 1913 a large crowd, including many women, had assembled in the court room before court opened, taking up every seat in the court room. The jury were in their room about 20 feet from the court room, and as Mr. Dorsey entered the room, the crowd applauded loudly by clapping of hands and stamping of feet, which the jury perhaps could have heard. The court did nothing but admonish the people that if the applause was repeated, he would clear the court room.

(g). On Monday the last day of the trial after the argument of counsel had been had and the charge of the court had been given and the case was in the hands of the jury, when Solicitor Dorsey left the court room a very large crowd awaited him in front of the court house and shouted and applauded by clapping their hands and shourting, "Hurrah for Dorsey."

(h). When it was announced that the jury had agreed upon a verdict, the Judge of the Superior Court, his honor L. S. Roan, went to the court house which was a comparatively small room on the first floor, at the junction of Hunter and Pryor streets, and found the court room packed with spectators.

Fearful of misconduct among the spectators in the court room, the court of his own motion cleared the room before the jury announced their verdict. When the verdict of guilty was rendered, the fact of the rendition of such verdict was signaled to the crowd on the outside, which consisted of a large concourse and crowd of people standing upon Hunter and Pryor streets. Immediately upon receiving such signal and while the court was engaged in polling the jury and before the polling ended great shouts arose from the people on the outside, expressing gratification. Great applauding, shouting and halloing was heard on the streets and so great became the noise on the streets that the court had dificulty in hearing the responses of the jurors as he polled the [illegible] incidents showed, as the defendant contends, that the defendant did not have a fair and impartial jury trial and that the demonstration of the crowds

attending court was such as to inevitably affect the jury.

The exhibits hereto attached marked J to AA inclusive are made a part of this ground.

66. Because the fair and impartial trial guaranteed him by the constitution of this State was not accorded the defendant for the following reasons:

The court room wherein this trial was had was situated at the corner of Hunter and Pryor streets. There are a number of windows on the Pryor street side looking out upon the street and furnishing easy access to any noises that would occur upon the street. The court room itself is situated on Hunter st. 15 or 20 feet from Pryor St. There is an open alley-way running from Pryor St., along by the side of the court house, and there are windows from the court room looking on to this alley and any noise in the alley can easily be heard in the Court room. When Solicitor Dorsey left the court room on the last day of the trial, after the case had been submitted to the jury, a large and boisterous crowd of several hundred people was standing in the street in front of the court house and as he came out greeted him with loud and boisterous applause, taking him upon their shoulders and carrying him across the street into the Kiser Building wherein was his office. 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. When it was announced that the jury had reached a verdict, his Honor, Judge L. S. Roan, went to the court room and found it crowded with spectators to such an extent as to interfere with the court's orderly procedure, and fearing misconduct in the court room, his Honor cleared it of spectators. The jury was then brought in for the purpose of delivering their verdict. When the verdict of guilty was announced a signal was given to the crowd on the outside to that effect. The large crowd standing on the outside cheered and shouted and hurrahed at the outset of the poll of the jury, and before more than one juror had been polled to such an extent that the Court had some difficulty in proceeding with the

poll of the jury, which was then in progress, and not finished. Indeed, so great was the noise and confusion without that the Court heard the responses of the jurors during the polling with some difficulty. The court was about 10 feet from the jury. In the court room was the jury, lawyers, newspaper men, and officers of the court, and among them there was no disorder.

The polling of the jury is an important part of the trial. It is inconceivable that any juror, even if the verdict was not his own, to announce that it was not, in the midst of the turmoil and strife without.

The ~~exhibits~~ J to AA ~~inclusive are~~ hereby made a part of this ground, and the Court will err if it does not grant a new trial on this ground.

67. 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 corroberated by facts and circumstances of the case or other creditable evidence.

The Court ought to have given this charge, although no written request was formerly 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.

68. Because the Court permitted to be read to the jury, over the objection of the defendant made at the time the testimony was offered, that same was immaterial, irrelevant, incompetent, and not binding upon Frank, a part of an affidavit made by the witness Minola McKnight, as follows:

~~They pay me $3.50 per week, but last week she paid me $4.~~ and one week she paid me $6.50. Up to the time of this murder I was getting $3.50 per week and the week right after the murder

I don't remember how much she paid me, and the next week they paid me $3.50 and the next week they paid me $6.50, and the next week they paid me $4. and the next week they paid me $4. One week, I don't remember which one, Mrs. Selig gave me $5, but it wasn't for my work, and they didn't tell me what it was for, she just said "Here is $5. Minola."

The Court permitted this part of the affidavit to be read to the jury over the objections above stated, and in doing so erred for the reasons stated.

This was prejudicial to the defendant, inasmuch as it permitted the affidavit of the witness Minola McKnight to be read to the jury to transactions between herself and the Seligs, with which Frank had no connection, but which the Solicitor General insisted showed that Frank's relatives were seeking to influence this darkey by paying her money in addition to that which she earned. The Seligs and Minola McKnight had been asked on cross examination if these statements in this affidavit were true, and had denied that these statements were true.

69. (ppp) Because the Court erred in permitting Mr. Hooper, for the State, to argue to the jury that the failure of the defense to cross examine the female witnesses who, in behalf of the State, had testified to the bad character of Frank for lasciviousness, was strong evidence of the fact that, if the defendant had cross examined them, they would have testified to individual incidents of immorality on the part of Frank, that the defendants knowledge that they would bring out such incidents was the reason for not cross examining the witnesses; and that the jury could, therefore, reasonably know that Frank had been guilty of specific incidents of immorality other than those brought out in the record.

Thedefendant strenuously objected to this line of argument on the part of Mr. Hooper and urged the Court to state to the jury that the failure to cross examine any of said witnesses justified no inference on the part of the jury that the cross-examination, if had, would have brought out anything hurtful to the general character of Frank.

This the Court declined to do and permitted the argument; and,

in so doing, committed error, for which a new trial should be granted.

70 (qqq) Because the Solicitor General, in his argument to the jury, stated, as follows: "The conduct of counsel in this case, as I stated, in refusing to cross examine these twenty young ladies, refutes effectively and absolutely that he had a good character. As I said, if this man had had a good character, no power on earth could have kept him and his counsel from asking where those girls got their information, and why it was they said that this defendant was a man of bad character. Now, that is a common sense proposition; you'd know it whether it was in a book or not. I have already shown you that under the law, they had the right to go into that character, and you saw that on cross examination they dared not do it--------Whenever any body has evidence in their possession, and they fail to produce it, the strongest presumption arises that it would be hurtful if they had; and their failure to introduce evidence is a circumstance against them. You don't need any law book to make you know that; that is true, because your common sense tells you that whenever a man can bring the evidence, and you know that he has got it and don't do it, the strongest presumption arises against him. And you know, as twelve honest men seeking to get at the truth, that the reason these able counsel did not ask those hair-brained fanatics, as Mr. Arnold called them before they had ever gone on the stand-- girls whose appearance is as good as any they brought, girls that you know by their manner on the stand are speaking the truth, girls who were unimpeached and unimpeachable, the reason they didn't ask them? Why? They dared not do it. You know it; if it had never been put in the law books, you would know it."

This address of the Solicitor was made in the hearing, and in the presence of, the jury, without any protest or comment on the part of the Court.

The defendant made no objection to this argument at the time same was being had, for the reason that similar argument made by Mr. Hooper had been objected to by counsel, and their objection overruled. The objection made to the argument of Mr. Hooper was not here repeated, for the reason that the Court had stated, in the outset of the case that objection once noted in the record

need not in similar instances be repeated, but that the Court would assume that similar objections had been made and overruled.

This argument of the Solicitor was not only illegal, but prejudicial to the defendant, in that he, in substance, urged upon the jury that a cross examination of female witnesses for the State, who testified to Frank's bad character for lasciviousness, would, upon cross examination, have testified as to specific acts of immorality against him.

71. (rrr). Because the Court permitted the Solicitor, over the objection of defendant's counsel, to argue before the jury that the wife of the defendant did not speedily visit him when he was first taken under arrest, and that her failure to do so showed a consciousness on her part that he husband was not innocent.

In addressing this question to the jury, the Solicitor said: "Do you tell me that there lives a true wife, conscious of her husbands innocence, that would not have gone through snap-shotters, reporters, and every thing else to have seen him. Frank said that his wife never went there, because she was afraid that the snap-shotters would get her picture, because she didn't want to go through the line of snap-shotters. I tell you, Gentlemen of the Jury, that there never lived a woman conscious of the rectitude and innocence of her husband who would not have gone through snap-shotters, reporters, and the advice of any Rabbi under the sun- and you know it.

Defendant's counsel objected to this line of argument, when the same was being made, upon the ground that the conduct of his wife could in no sense be used as evidence of Frank's guilt, and that the Solicitor had no right to argue as he did.

The Court declined to stop the argument, but permitted it to continue. The Solicitor impassionately argued it to the jury--that Mrs. Frank's conduct in not visiting her husband was strong evidence of his guilt.

Argument was highly prejudicial to the defendant and the court erred in permitted it to be made and in not reprimanding the Solicitor General for the making of such an argument

72. (sss). Because the Court permitted the Solicitor General,

in arguing the relative value of the expert testimony delivered by the physicians called for the State and defense, to intimate that the defense, in calling its physicians had been influenced by the the fact that certain physicians called were the family physicians of some of the jurors. In discussing it, the solicitor said: "It would not surprise me if these able, astute gentlemen, vigilent as they have shown themselves to be, did not go out and get some doctors who have been the family physicians, who are well known to some of the members of this jury, for the effect it might have upon you; and I am going to show that there must have been something besides the training of these men, and I am going to trace them with our doctors. I can't see any other reason in God's world for getting out and getting these practitioners, who have never had any special training on stomach analysis, and who have not had any training on the analysis of tissues--like a pathologist has had, except upon that theory."

Objection was made to this argument of the Solicitor, at the time it was being made, upon the ground that there was no evidence to support any such argument; that it was illegal, prejudicial, and highly improper.

73. Because the juror A. H. Henslee was not a fair and impartial juror, but was prejudiced against the defendant when he was selected as a juror, had previously thereto formed and expressed a decided opinion as to the guilt of the defendant and, when selected as a juror, was biased against the prisoner in favor of the State. Affidavits are hereto attached and marked Exhibits A, B, C, D, E, I, BB. CC. DD. EE and J. J. KK. LL. MM. NN. which are hereby made a part of this motion for new trial. Affidavits sustaining the character of the witnesses against said Henslee are hereto attached, marked Exhibits FF, GG, HH and II

The conduct of this juror, as shown by the affidavits and other evidence, the condition, conduct, and state of mind of this juror is conclusive that the defendant did not have a fair and impartial jury trial, as provided by the laws and the constitution of this State, and a new trial should be granted. Upon failure to doso, the Court will commit error.

74. Because the juror Johenning was not a fair and impartial juror, in that he had a fixed opinion that the defendant was guilty prior to, and at, the time he was taken on the jury and was not a fair and impartial and unbiased juror. Affidavits showing that he was not a fair and impartial juror are hereto attached and marked Exhibits E. F. G. K.and I, and made a part of this motion for new trial.

The opinion, conduct and state of mind of this juror prior to, and at the time of, his selection as a juror shows that the defendant did not have a fair and impartial trial, as provided by the laws and the Constitution of this State; and, because of the unfairness and impartiality of this juror, a new trial should be granted, and the Court will commit error in not granting it.

75. Because this defendant, as he contends, did not have a fair and impartial jury trial, guaranteed to him under the laws of this State, for the following reasons , to-wit.

Public sentiment seemed to the Court to be greatly against him. The court room was a small room, and during the argu ment of the case so far as the Court could see about every seat in the court room was taken, in and without the bar, and the aisles at each end of the court room were packed with spectators. The Jury, in going from the jury seats to the jury room, during the session of the court, and in going to and from from the court room morning, evening and noon, were dependent upon passage-ways made for them by the officers of Court. The bar of the court room itself was crowded, leaving only a small space to be occupied by counsel in their argument to the jury. The jury box, when occupied by the jury, was inclosed by the crowd sitting and standing in such close proximity thereto that the whispers of the crowd could be heard during a part of the trial.

When the Court's attention was called to this he ordered the Sheriff to move the crowd back, and this was done.

During the argument of the solicitor, Mr. Arnold of counsel for the defense, made an objection to the argument of the

solicitor, and the crowd laughed at him, and Mr. Arnold appealed to the court.

On Saturday, prior to the rendition of the verdict on Monday, the Court was considering whether or not he should go on with the trial during Saturday evening, or to what hour he should extend it in the evening, the excitement in and without the court room was so apparent as to cause apprehension in the mind of the Court as to whether he could safely continue the trial during Saturday afternoon; and, in making up his mind about the wisdom of thus continuing the trial, his Honor conferred with, while on the stand, and in the presence of the jury, the Chief of Police of Atlanta, and the Colonel of the Fifth Georgia Regiment stationed in Atlanta conferred with his Honor. Not only so, but the public press, apprehending trouble if the case continued on Saturday, united in a request to the Court that he not continue the Court on Saturday evening. The Court, being thus advised, felt it unwise to extend the case on Saturday evening, and continued it until Monday morning. It was evident on Monday morning that the public excitement had not subsided, and that it was as intense as it was on Saturday previous. The same

excited crowds were present, and the court house was in the same crowded condition. When the solicitor entered the court room he was met with applause by the large crowd--ladies and gentlemen present by stamping their feet and clapping their hands, while the jury was in their room about twenty feet away.

While Mr. Arnold of the defense was making a motion for a mis trial, and while taking testimony to support it before the Court, the crowd applauded when the witness testified that he did not think the jury heard the applause of the crowd on Friday of the trial. The jury was not in the court room, but were in the jury room about 20 feet away.

When the jury was finally charged by the Court, and the case submitted to them, and when Mr. Dorsey left the court room, a large crowd on the outside of the court house, and in the streets cheered by yelling, and clapping hands, and yelling "Hurrah for Dorsey":

When it was announced that the jury had agreed upon a verdict crowds had thronged the court room to such an extent that the Court felt bound to clear the court room before receiving the verdict.

This the Court did. But, when the verdict of the jury was ren dered, a large crowd had thronged the outside of the court house; some one signaled to the outside what the verdict was, and the crowd on the outside raised amighty shout of approval. So great was the shouting and applause on the outside that the Court had some difficulty in hearing the response of the jurors as he called them.

The defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel. This waiver was accepted and acquiesced in by the Court, because of the fear of violence that might be done the defendant were he in Court when the verdict was rendered.

When Mr. Dorsey left the court room, he was met at the court house door by a multitude, was hurrahed, cheered, taken upon the shoulder of a part of the crowd and carried partly to the build ing opposite, wherein he had his office.

This defendant contends that the above recital shows that he did not have a fair and impartial jury trial, that a new trial ought to be granted, and that the court failing to grant such new trial, will commit error.

In support of this ground of the motion movant refers to the affidavits hereto attached marked Exhibits J to AA inclusive, and hereby made a part of this motion for new trial.

76. Because the Court erred in not leaving it to the jury to say whether or not, under the facts, the witness Conley was an accomplice.

The state insisted that Conley was watching for Frank to enable him to have connection with some girl, naturally or unnaturally; and Frank seeking to get her consent and failing killed her to insure her silence, and then employed Conley who had previously been watching for him to enable him to conceal her body. If Conley was aiding and abetting Frank in his transactions with Mary Phagan, and if, as a natural and probable result of

such transaction, Mary Phagan met her death, then Conley would be an accomplice of Frank, although he had no personal part in her killing.

The Court, under proper instructions, ought to have left it to the jury to say whether Conley was or not an accomplice of Frank; and, in failing to do, and because he failed to do so the Court committed error.

77. The Court erred in not charging the jury that if, under instructions given them, they found that Conley was an accomplice of Frank, they could not convict Frank under the testimony of Conley alone; but that, to do so, there must be a witness other than Conley or circumstances corroborating the evidence of Conley

78. Because the Court permitted the witness Irene Jackson at the instance of the solicitor General, and over the objection of the defendant, made at the time the testimony was offered, that the same was irrelevant, immaterial, illegal, and prejudicial to the defendant, to testify substantially as follows:

I remember having a conversation with Mr. Starnes about a dressing room incident.I told him that Mr. Frank came to the door of the dressing room while Emily Mayfield was dressing. He looked and turned around and walked out--just pushed the door open and looked in. I don't know whether he smiled or not. I never noticed to see whether he smiled or not; he just kind of looked at us and turned and walked out. I didn't time him as to how long he stayed; he just came and looked and turned and walked out. At the time, Miss Emily Mayfield had off her top dress and was holding her old dress in her hand to put it on. I did not report that the forelady, but Miss Ermilie did. I have heard remarks other than those of Miss Mayfield about Frank going into the dressing room, but I don't remember who said them, I just remember I heard something about it, two or three different times, but I don't remember anything about it, just a few times. I heard the girls talking about Mr. Frank going into the dressing room on two of three different occasions. It was the middle of the week after we started to work there; I don't remember the time. Mr. Frank also entered the dressing room when my sister was in there laying down; she just had her feet up on the table;

she had them on a stool, I believe,She was dressed. I don't remember how her dress was; I didn't look, I paid no attention to him, only he just walked in and turned and walked out; looked at the girls that were sitting in the window and walked out. There was something said about this, but I don't remember. I have heard something about him going in the room and staring at them, but I don't remember exactly. Mr. Frank walked in the dressing room on Miss Mamie Kitchens. She and I were in there. I have heard this spoken of, but I don't remember. I have heard them speak of other times, when I wasn't there. Mr. Frank said nothing either time when I was there. The door was pushed to, but there was no way to fasten the door. He pushed the door open and stood in the door. the dressing room had a mirror in it. It was all one room, except there were a few lockers for the foreladies, and there was a place where the girls changed their street dresses and got into their working dresses, and vice versa. There was no way for Mr. Frank to tell before he opened the door what the condition of the girls was in there. I do not know whether he knew they were in there or not. That was the usual time for the girls to go in the dressing room, undress and get ready to go to work, changing their street clothes and putting on their working clothes. We had all registered on before we went up there in the dressing room. Mr. Frank knew the girls had stopped there to register. The day he looked in the dressing room at Miss Mayfield, he smiled, or made some kind of a face that looked like a smile--smiling at Miss Mayfield, he didn't speak or didn't say a work.

This evidence was objected to for the reasons above stated, and for the further reason that statements tending to show the conduct of Mr. Frank with girls, in going into the dressing room with girls, was intended to create prejudice in the minds of the jurors against the defendant; and, not to illustrate the question of whether he was or was not the murderer of Mary Phagan. The Court overruled these objections and let the testimony go to the jury, and, in doing so, movant contends, [illegible] for the reasons above stated.

79. (zzz). Because the Court permitted the witness, Harlee Branch, at the instance of the Solicitor General, to testify to

incidents at the Pencil Factory, wherein Conley, after having made the third affidavit, purported to re-enact the occurence of the murder between himself and Frank, wherein the body of Mary Phagan was taken from the office floor to the cellar of the factory, the testimony permitted by the Court being substantially as follows

" I will have to give you the time of Conley's arrival at the Factory approximately. I was up there at twelve o'clock, and I was a few minutes late. Conley had not arrived there then. We waited until they brought him there, which was probably ten or fifteen minutes later. The officers brought Conley into the main entrance of the factory here and to the stair case--I don't know where the stair case is here--yes, hereit is (indicating on diagram) and they carried him up here and told him what he was therefor, and questioned him, and made him understand that he was to re-enact the pantomime. After a few minutes conversation, and a very brief conversation, Conley led the officers back here and turned of to his left to a place back here: I guess this is it (indicating on diagram), right where this is near some toilets and he was telling his story as he went through there, and he said when he got up there, he went back and found this body in that place. He was talking constantly--all the time; I don't know how he made out a part of his story. Well, when he got back---After reaching this point at the rear left side of the factory, describing the position of the body, as he stated it, he stated the head was lying towards the North and the feet towards the South, as indicated, and there was a cord around the neck. He didn't state how long it took for the various movements. I didn't time it: I know the time I arrived there and the time I left the factory. Conley said when he found the body he came up to Mr. Frank--called to him some point along here I should judge (indicating on the diagram). I don't understand this diagram exactly. And he told him the girl was dead, and I don't know just exactly what Frank said. I will try to eliminate as much of that conversation as I can. Anyhow, he said he came on up to where Mr. Frank was, and that he was instructed to go to the cotton room, which he showed us; I don't know, it must be on the same side of the building about here. I judge (indicating), and he went in there. He showed us the cotton room, and he said he went back, and he

said he said he went back, and he did go back, led us back, and told about taking up the body, how he brought it up on his shoulder, and then, in front of a little kind of impression on the wall, he said he dropped it, and he indicated the place, and then he come up and told Mr. Frank about it--that he would have to come and help him or something like that-- and that Mr. Frank came back and took the feet. I believe he said, and he took the head, and they brought the body up to the elevator and put it on the elevator. He was enacting this all the time and talking all the time. He described how the body was put on the elevator, and he said Mr. Frank run the elevator down, and he went down on the elevator. On this trip he went down in the elevator to the basement, and he said Mr. Frank helped to take the body out, and they dropped it there, and Mr. Frank told him to take it up and carry it back, and he put the body on his shoulder and carried it back to this saw dust which is away back here, and that he came on back, and he said there was some things in here which he threw on this trash pile, and Mr. Frank, he said, was up in the cubby hole he said, somewhere back there-- and later he led us up there-and that Mr. Frank told him to run the elevator up; so Conley and the officers and the rest of us who were with him came up on the elevator, and when they got to the first floor, just before getting to the first floor, he said this was where Mr. Frank got on the elevator. Mr. Frank was waiting there for him. Then they brought the elevator on up to the second floor, and he had them to stop the elevator, just, I suppose, a foot or a little more below the landing; and he said Mr. Frank jumped off when the elevator was about that point, and after getting up, he said Mr. Frank went around the elevator to a sink that he showed us back of the elevator, to wash his hands, and he waited out in front and he said he shut off the power while Mr. Frank was gone around there; and when Mr. Frank came back, they went in the office, and he led us on in the office through--there is an outer office there, and he came in this way and come through in this office back here, this inner office, and he indicated Mr. Frank's desk and a desk right behind it: I presume this is the

two desks (indicating); that Mr. Frank sat down in the chair at that desk, and he told him to sit at the other desk, and Mr. Frank told him to write some notes; and he was asked by some of the officers to write what Mr. Frank told him to write, and he sat down there and wrote one note, and I believe---I know the note he wrote, and I don't know whether he wrote one or two and that Mr. Frank handed him sone money and that later he took it back, and I don't remember whether he gave him the cigarettes and money before or after this, I don't re-call. Anyway when he was in here, after he had written the notes for the officers, I found it was time for me to get in the office with my copy. He hadn't finished; he was still sitting there; and I telephoned in to the office for relief--someone to relieve me- and I went to the office and I left him there in the office, and I went in. I judge it was about a quarter past twelve when Conley got there. I must have gotten there five minutes before that time. I left about one o'clock. They rushed Conley right up the steps and, probably two or three minutes after he got up there, he began this enactment, and he went very rapidly- we sort of trotted to keep behind him. Questions were constantly asked him by four or five of the officers. I have out out a good deal of Conley's talking; just how much, I have no way of indicating. He was talking constantly, except when interrupted by questions. I didn't time it when I got there. When I got to the office from the Police Station it was tenminutes after twleve and I walked down just about a block and a half. Conley got there, I should say, about five minutes after I did. I left a little after one, probably five or ten minutes. It would be a difficult thing for me to estimate how much time it took Conley to enact what he did, leaving out the conversation he had with different men. While he was acting, he was acting very rapidly; he kept us on the trot. There is no way for me to give you my opinion as to how long it took Conley to go through that demonstration there was no way to [illegible] difference between the two--between the time he was acting and talking. I don't attempt to do that.

The defendant objected to this testimony, because;

(a). This so-called experiment made with Conley was solely an endeavor on their part to justify his story;

(b). The sayings and actings of Conley, as aforesaid, not under oath, had and made without cross examination, and reported by the witness to the court, the net result of which is a repitition of Conley's statement, without the sanction of an oath.

(c). That Conley went to the factory immediately after making his last affidavit, that that last affidavit is not the way he tells the story on the stand; that he tells it wholly differently on the stand, at least differently in may particulars; that it cannot help the jury for Conley to go to illustrate that affidavit when he says now on the stand that much of it was a lie, and that it did not happen that way at all; that this evidence was of another transaction, not binding upon this defendant.

The Court overruled the objection and admitted the testimony to the jury, and, in doing so, committed error, for the reasons above stated.

80. (aaaa). Because the Court over over the objection of the defendant, made at the time the evidence was offered, that the same was immaterial, incompetent, illegal and prejudical to the defendant, permitted the Solicitor General to ask the following questions, and the witness, Miss Maggie Griffin, to make the following answers:

Q. Are you acquainted with the general character of Leo M. Frank for lasciviousness, that is his relations with women?

A. Yes sir.

The Court admitted the above questions and answer, over objection of the defendant as above stated, and thereby erred for the reason stated.

81 (bbbb). Because the Court over objection of the defendant, made at the time the evidence was offered, that the same was immaterial, incompetent, illegal and prejudicial to the defendant, permitted the Solicitor General to ask the following questions, and the witness Miss Myrtie Cato, to make the following answers:

Q. Miss Cato, I want to ask you one other question, also. Are you acquainted with the general character of Leo M. Frank

for lasciviousness; that is, his relations towards women?

A. Yes sir.

Q. Is it good or bad?

A. Bad.

The Court admitted the above questions and answers, over objection of the defendant as above stated, and thereby erred, for the reasons stated.

82. (cccc). Because the Court over objection of the defendant, made at the time the evidence was offered, that the same was immaterial, incompetent, illegal and prejudicial to the defendant permitted the Solicitor General to ask the following questions, and the witness, Mrs. H. R. Johnson, to make the following answers:

Q. Now, are you acquatinted with his (Frank's) general character for lasciviousness; that is, his general character towards women generally?

A. No sir, not very much.

Q. Not very much? Well, answer the question; yes or no; are you acquainted?

Q. All right, she said, not very much.

The Court admitted the above questions and answer, over the objection of defendant as above stated and thereby erred, for the reasons stated.

83 (dddd) Because the Court, over the objections of the defendant, made at the time the evidence was offered, that the same was immaterial, incompetent, illegal and prejudicial to the defendant, permitted the solicitor general to ask the following questions, and the witness Miss Marie Karst, to make the following answers:

Q. Bad; now, Miss Karst, I will ask you if you are acquainted with his (Frank's) general character for lasciviousness, that is, his attitude towards girls and women?

A. Yes sir.

Q. Is that character good or bad? A. Bad.

The Court admitted the above questions and answers, over the objection of the defendant as above stated, and thereby erred for the reason stated.

84. (eeee). Because the Court, over the objection of the defendant, made at the time the evidence was offered, that the same was immaterial, incompetent, illegal and prejudicial to the defendant, permitted the solicitor general to ask the following questions, and the witness, Miss Nellie Pett is to make the following answers:

Q. Are you acquainted with his (Frank's) general character for lasciviousness; that is, with women prior to that time?

A. Yes sir.

Q. Is it good or bad? A. Bad.

The Court admitted the above questions and answers, over objection of the defendant as above stated, and thereby erred, for the reasons stated.

85 (ffff) Because the Court, over the objection of the defendant, made at the time the evidence was offered, that the same was immaterial, incompetent, illegal and prejudicial to the defendant, permitted the Solicitor General to ask the following questions, and the witness, Miss May Davis, to make the following answers:

Q. I want to ask you another question. Are you acquainted with the general character of Leo M. Frank, prior to April 26, 1913, as to lasciviousness, that is, his relations with girls and women?

A. Yes.

Q. Is that good or bad? A. Bad.

The Court admitted the above questions and answers, over objection of the defendant as above stated, and thereby erred, for the reasons stated.

86. (gggg) Because the Court, over the objection of the defendant, made at the time the evidence was offered, that the same was immaterial, incompetent, illegal and prejudicial to the defendant, permitted the Solicitor General to ask the following questions, and the witness. Mrs. Mary E. Wallace, to make the following answers:

Q. I will ask you now if you are acquainted with his general character for lasciviousness; that is, as to his (Frank's) attitude with towards girls and women? A. Yes sir.

Q. Is that good or bad? A. Bad.

The Court admitted the above questions and answers, over the objection of the defendant as above stated, and thereby erred, for the reasons stated.

87 (hhhh). Because the Court over the objection of the defendant, made at the time the evidence was offered, that the same was immaterial, incompetent, illegal and prejudicial to the defendant, permitted the solicitor general to ask the following questions, and the witness, Miss Estelle Winkle, to make the following answers:

Q. Are you acquainted with his (Frank(s) general character for lasciviousness; that is, his relations with girls and women?
A. Yes sir, Is that Good or bad? A. Bad.

The court admitted the above questions and answers, over objection of defendant, made at the time the evidence was offered, and thereby erred, for the reasons stated.

88 (iiii) Because the Court erred, over the objection of the defendant that the same was irrelevant and immaterial and prejudicial to defendant, in permitting the witness Louis Ingram to testify as follows:

" I am a conductor for the Georgia Railway & Power Co., I come to town of them cars coming in on English Avenue going to Cooper street, known as the English Ave., car. I have seen them come in and been on it when it come in, the English Ave., car due at the junction of Marietta and Broad sts., according to schedule at 12:07. I have seen the car due at Marietta and Broad Sts., according to schedule at 12:07, the English Ave., car, several time come in ahead of the car I was coming in on, as much ahead as four minutes, I saw a car that came in this morning that was due in town at 8:30 and it got in at 8:24. I know the Motorman Matthews. I have seen his car ahead of time. I could not say how often."

The Court permitted this testimony over the objection before stated, and in doing so erred for the reasons stated. This was prejudicial to the defendant becauae it tended to show that at times other than on the day of the murder, the English Ave. car, which on that day was run by the witness Motorman Matthews, had reached Marietta and Broad Sts., four minutes ahead of time. It

became material to determine what time this English Ave., car reached Broad Street on the day of the murder. The motorman Matthews and the conductor, swore that on that day the English Ave., car reached Broad Street at 12:07. The Court permitted this and other like testimony to be introduced as tending to discredit their statements that the car was on schedule time that day. In doing this the Court erred, for the fact that the English Ave., car was ahead of time as much as four minutes on other days did not indicate that it was ahead of time on the day of the murder.

89. (jjjj). Because the Court erred, over the objection of the defendant that the same was irrelevant and immaterial and prejudicial to defendant, in permitting the witness W. D. Owens to testify as follows:

". I run on what is known as Route Eight, White City to Howell Station, for the Georgia Railway & Power Co., We were due in town at 12:05. My schedule is ahead of the Cooper Street and English Ave., schedule two minutes I have known the English Ave and Cooper street car to get to the junction of Marietta and Broad Streets ahead of my car. The English Ave., car is due there at 12:07; my schedule at 12:05. I have known the English Ave., car to get there as much as two minutes ahead of us. That would make the English Ave., car four minutes ahead of time. I have known this to occur after April 26th, I don't know whether it occurred prior to that time"

The Court permitted this testimony over the objection before stated, and in doing so erred for the reasons stated. This was prejudicial to the defendant because it tended to show that at times other than on the day of the murder, the English Ave., car which on that day was run by the witness Motorman Matthews, had reached Marietta and Broad Streets four minutes ahead of time. It became material to determine what time this English Ave ., car reached Broad Street on the day of the murder. The Motorman Matthews and the conductor, swore that on that day the English Ave., car reached Broad Street at 12:07, the Court permitted this and other like testimony to be introduced as tending to discredit their statements that the car was on schedule time that day. In doing this the Court erred, for the fact that the

English Avenue car was ahead of time as much as four minutes on other days did not indicate that it was ahead of time on the day of the murder.

90. (kkkk). Because of the following colloguy which occured during the trial and while the witness, John Ashley Jones, was on the stand, during the cross examination of Jones by the Solicitor: -

Q. You never heard anybody down there say anything about Mr. Frank's practices and relations with the girls.

A. Not in the Pencil Factory.

Q. Not at all? You never did talk to any of these young girls, did you?

A. No, I don't happen to know any of them.

Q. Or any of the men?

A. No.

Q. You don't know what kind of practices Mr. Frank may have carried on down there in the Pencil Factory?

A. No.

Q. You don't know, you never heard anybody say that Mr. Frank would take girls in his lap in his office here?

A. No.

(Here objection was made by Mr. Arnold)

The Court: On cross examination he can ask him if he has heard of certain things.

Mr. Arnold: Up to April 26th?

The Court, Yes sir.

Mr. Dorsey: I am not four-flushing or any such thing; I am going to bring the witnesses here.

Q. You never heard of Frank going out there to Druid Hills and being caught did you, before April 26th?

A. No, but our reporter, it was his business to find out, and if he had found it out, he certainly would not have issued such a policy.

Q. Now about twelve months ago, you never heard of Frank kissing [illegible] on their breast around there.

A. No, I never heard such a thing.

Q. You never heard of that at all?

A. I never heard that. I had been in Mr. Frank's---

Q. You never talked to Tom Blackstock, then, did you?

A. I haven't the pleasure of Mr. Blackstock's acquaintence.

Q. Did you ever know Mrs. L. D.Coursey?

A. I can't say that I ever heard of her.

Q. Miss Myrtie Cato, you never heard of her, and that he would go into the----

A. Mr. Dorsey, I have been down there.

Q. By the Court: He wants to know if you ever heard of that before.

Q. He made no apology and no explanation, but just walked right on in there when they were lying on the couch?

A. I never heard that.

Q. Did you ever hear of his putting his arms around Myrtie Cato in the office?

A. No sir.

Q. Did you ever hear about the time he went in on little Gertie Jackson, that was sick, lying in the dressing room with her dress up, and stood up there and looked at her, and hear any talk of the girls there about his attitude?

A. No sir.

Q. Did you ever hear about his frequently going into the dressing room with Vernie McDaniel?

A. No sir.

Q. Did you ever hear of the time it was said that Miss Pearl Burrelson --about five years ago, when he held out the money in one hand and put his hand on the girl, that she threw the monkey wrench at him? You never heard of that time?

A. No sir.

Q. Did you ever talk to Mrs. Martin Duncan?

A. No sir, not that I know of.

Q. Did you ever hear them say that he paid special attention to the girls, and winked and smiled at them, and had nude pictures hung up in his office, and walked around and slapped the girls on the seat?

Q. No sir.

Q. Miss Wingate, 34 Mills Street, did you ever talk to her

about Frank?

A. No sir, I don't know her.

Q. Did you ever hear C. D. Donegan Duncan, talk about Frank?

A. No sir.

Q. You never heard any of these factory people talk about him?

A, No sir.

The Court erred in permitting the Solicitor, although the witness denied hearing all of the remarks referred to, to say in the presence of the jury that he was not four-flushing, but that he was going to bring the witnesses there, thereby improperly saying to the jury that he had such witnesses and meant to bring them in.

The Court erred in not withdrawing this whole subject from the jury and in not rebuking the Solicitor General for injecting the questions in the case and asserting that he had witnesses to prove the things asked about.

These suggestions and intimations of the Solicitor General were exceedingly prejudicial to the defendant, and for making them he ought to have been severally rebuked by the Court, and failure of the Court to do so was cause for a new trial.

91. (1111) Because the court erred in charging the jury as follows:

" Is Leo M. Frank guilty? Are you satisfied on that beyond a reasonable doubt from the evidence in this case? Or is his plea of not guilty the truth.

The Court erred in putting the proposition of the defendant's guilt or innocence to the jury in this manner, because the effect of the same was to put the burden upon the defendant of establishing his plea of not guilty, and the further effect was to impress upon the jury that unless they believed that the defendant's plea of not guilty was the truth that they could not acquit. The tendency of this charge was to impress upon the jury that they were to consider only upon the one side as to whether they believed Leo M. Frank guilty or upon the other side they were to consider only the question of whether they believed his plea of not guilty, and there was no middle ground in the case, and movant says that the error in this charge is that it leaves entirely out of view the consideration of the third proposition which the

jury had the right to consider, and that is as to whether, even though they did not believe his plea of not guilty the truth, still if they had a reasonable doubt in their minds of his guilt they should acquit him.

93. (qqqq) Movant further says that a new trial should be granted because of the following:

Mr. Dorsey, the solicitor general, in the concluding argument, made the following statement.

"Now, gentlemen, (addressing the jury) Mr. Arnold spoke to you about the Durant case. That case is a celebrated case; It was said that that case was the greatest crime of the century. I don't know where Mr. Arnold got his authority for the statement that he made with reference to that case. I would like to know it."

Whereupon the following colloquy occurred:

" Mr. Arnold: I got it out the the public prints, at the time , Mr. Dorsey, published all over the country: I read it in the newspapers, that's where I got it."

Mr. Dorsey (resuming): "On April 15, 1913, Mr. C. M. Pickett, the District Attorney of the City of San Francisco, wrote a letter"

Mr. Arnold: I want to object to any communication between Mr. Pickett and Mr. Dorsey, it's just a personal letter from this man, and I could write to some other person there and get information satisfactory to me, no doubt, just as Mr. Dorsey has done, and I object to his reading any letters or communications from anybody out there."

"Mr. Dorsey: This is a matter of public notoriety, Here's his reply to a telegram I sent him, and in view of his statement, I have got a right to read it to the jury".

" Mr. Arnold: You can argue a matter of public notoriety, you can argue a matter that appears in the public prints,- my friend can, but as to his writing particular letters to particular men, why, that's introducing evidence, and I must object to it; he has got a right to state simply his recollection of the occurrence, but he can't read any letters or telegrams from any particular people on the subject."

". Mr. Dorsey: Mr. Arnold brought this in, and I telegraphed to San Francisco, and I want to read this telegram to the jury; can't I do it?"

"Mr. Arnold: If the Court please I want to object to any particular letter or telegram, I can telegraph and get my information as well as he can, I don't know whether the information is true, I don't know who he telegraphed about it; I have got a right to argue a matter that appears in the public prints and that's all I argued,-what appears in the papers,- it may be right or wrong, but if my friend has a friend he knows there and writes and gets some information, that's introducing evidence, and I want to put him on notice that I object to it. I have got the sameright to telegraph there and get my own information. And besides, my friend seems to know about that case pretty well, he's writing four months ago. Why did he do it?"

Mr. Dorsey, (resuming): "Because I anticipated some such claim would be made in this presence."

". Mr. Arnold: You anticipated it, then, I presume, because you knew it was published; that's what I went on".

Mr. Doresy (resuming); " I anticipated it, and I know the truth about that case".

Mr. Arnold, I object to his reading any communication unless I havethe right to investigate it also; I am going only on what I read in the public press. April 15th, is nearly two weeks before the crime is alleged to have been committed. I want to record an objections right now to my friend doing any such thing as that, reading a telegram from anybody picked out by my friend Dorsey to give him the kind of information he wants for his speech, and I claim the right to communicate out there myself and get such information as I can, if he's given the right to do it."

" The Court:- I'll either have to expunge from the jury what you told the jury, in your argument, or --"

" Mr. Arnold: I don't want it expunged, I stand on it."

"The Court: I have either got to do one of the two."

"Mr. Dorsey: No sir, can't I stated to this jury what I know about it, as well as he can state what he knows"?

". Mr. Arnold: Certainly he can, as a matter of public notoriety, but not as a matter of individual information or opinion".

"The Court: You can state, Mr. Dorsey, to the jury, your information about the Durant case, just like he did, but you can't read anything,- don't introduce any evidence".

Mr. Dorsey (resuming) "My information is that nobody has ever confessed the murder of Blanche Lamont and Minnie Williams But, gentlemen of the jury, as I'll show you by reading this book, it was proved at the trial, and there can be no question upon the fact, Theodore Durant was guilty, the body of one of these girls having been found in the belfry of the church in question; and the other in the basement, Here's the book containing an account of that case, reported in the 48 Pacific Reporter, and this showed, gentlemen of the jury, that the body of that girl, stripped stark naked, was found in the belfry of Emanuel church, in San Francisco, after she had been missing for two weeks, It shows that Durant was a medical student of high standing, and a prominent member of the church, with superb character, a better character than is shown by this man Leo M. Frank, because not a soul came in to say that he didn't enjoy the confidence and respect of every member of that large congregation, and all the medical students with whom he associated. Another thing, this book shows that the crime was committed on 1895, and this man Durant never mounted the gallows until 1898, and the facts are that his mother took the remains of her son and cremated them, because she didn't want them to fall into the hands of the medical students, as they would have done in the State of California, had she not made the demand and received the body. Hence, that's all poppy-cock he was telling you about. There never was a guiltier man, there never was a man of higher character, there never was a more courageous jury or better satisfied community, than Thedore Durant, the jury that tried him, and the people of San Francisco, where he lived and committed his crime and died ."

Movant says that a new trial should be granted, because of the fact that the Court did not squarely and unequivocally rule that the jury should not consider the statement Mr. Dorsey made as to the letter, C. M. Pickett, the District Attorney, had

written, and that a new trial should be granted because the argument was illegal, unwarranted, not sustained by the evidence, and tended to inflame and unduly prejudice the jury's mind. Neither the letter from Pickett nor the telegram was read further than is shown in the foregoing statement.

93. The movant says that a new trial should be granted because of the following grounds:

The Solicitor General having, in his concluding argument, made the various statements of fact about the Durant case, as shown in the preceding ground of this motion, the judge erred in failing to charge the jury as follows, to-wit:

The jury was instructed that the facts in other cases read or stated in your hearing are to have no influence upon you in making your verdict. You are to try this case upon its own facts and upon the opinion you entertain of the evidence here introduced

94. Movant says that a new trial should be granted because of the following ground:

The Solicitor General having, in his concluding argument, made the various statements of fact about the Durant case, as shown in the preceding ground of this motion, the judge erred in failing to charge the jury as follows: to-wit: The Jury are instructed that the facts in other cases read or stated in your hearing are to have no influence upon you in making your verdict, You are to try this case upon its own facts and upon the opinion you entertain of the evidence here introduced.

95. (ssss) Because the Court should have given in charge the instructions set forth in the preceding ground, because of the following argument made by the Solicitor General, in his concluding argument to the jury, said argument being a discussion of the facts of other cases, and requiring such charge as was requested, the remarks, of the Solicitor General in conclusion, being as follows:

" Oscar Wilde an Irish knight, a literary man, brilliant, the author of works that will go down the ages,--Lady Windemere's (?) Fan, De Profundis, which he wrote while confined in jail; a man who had the efforntery and the boldness, when the Marquis of Queensberry saw that there was something wrong between this intellectual giant and his son, sought to break up their companionship;

he sued the Marquies for damages, which brought retaliation on the part of the Marquis for criminal practices on the part of Wilde, this intellectual giant; and wherever the English language is read, the effrontery, the boldness, the coolness of this man, Oscar Wilde, as he stood the cross examination of the ablest lawyers of English,- an effrontery that is characteristic of the man of his type, that examination will remain the subject matter of study for lawyers and for people who are interested in the type of prevert like this man. Not even Oscar Wilde's wife, for he was a married man and had two children, - suspected that he was guilty of such immoral practices, and, as I say, it never would have been brought to light probably, because committed in secret, had not this man had the effrontery and the boldness and the impudence himself to start the proceeding which culminated in sending him to prison for three long years. He's the man who led the aesthetic movement, he was a scholar, a literary man, cool, calm, and cultured, and as Isay, his cross examination is a thing to be read with admiration by all lawyers, but he was convicted and in his old age, went tottering to his grave, a confessed pervert. Good character? Why, he came to America, after having launched what is known as the "aesthetic movement" in England, and throughout this country lectured to large audiences, and it is he who raised the sunflower from a weed to the dignity of a flower. Handsome, not lacking in physical or moral courage, and yet a pervert, but a man of previous good character.

Abe Ruef, of San Francisco, a man of his race and religion-- was the boss of the town, respected and honored, but he corrupted Schmitt, and he corrupted everything that he put his hands on, and just as a life of immorality, a life of sin, a life in which he fooled the good people when debauching the poor grils with whom he came in contact, has brought this man before this jury so did evehtually Abe Ruef's career terminate in the penitentiary. I have already referred to Durant. Good character isn't worth a cent when you have got the case before you. And crime don't go only with the ignorant and the poor. The ignorant, like Jim Conley, as an illustration, commit the small crime, and he doesn't know anything about some of this higher type of

crimes, but a man of high intellect and wonderful endowments which, if directed in the right line, bring honor and glory if those same faculties and talents are perverted and not controlled, as was the case with this man, they will carry him down. Look at W. Due, the mayor of Charlottesville; a man of such reputation that the people elevated him to the head of that municipality; but notwithstanding that good reputation, he didnt have rock bed character, and becoming tired of his wife, he shot her in the bath tub, and the jury of gallant and noble and courageous Virginia gentlemen, not withstanding his good character, send him to a felon's grave. Richeson, of Boston, was a preacher, who enjoyed the confidence of his flock. He was engaged to one of the wealthiest and most fascinating women of Boston, but an entanglement with a poor little girl, of whom he wished to rid himself, caused this man, Richeson, to so far forget his character and reputation and his career, as to put her to death: And all these are cases of circumstantial evidence. And after conviction, after he had fought, he at last admitted it, in the hope that the Governor would at last save his life, but he didn't do it, and the Massachusetts jury and the Massachusetts Governor were courageous enough to let that man who had taken that poor girl's life to save his reputation as the pastor of his flock, go, and it is an illustration that will encourage and stimulate every right thinking man to do his duty. Then, there's Beattie, Henry Clay Beattie, of Richmond, of splendid family, a wealthy family proved good character, though he didn't possess it, took his wife, the mother of a twelve month's old baby, out automobiling, and shot her; yet that man, looking at the blood in the automobile, joked, joked, joked. He was cool and calm, but he joked too much: and although the detectives were abused and maligned, and slush funds to save him from the gallows were used, in his defense a courageous jury, and honest jury a Virginia jury, measured up to the requirements of the hour and sent him to his death; thus putting old Virginia and her citizenship on ahigh plane. And he never did confess, but left a note to be read after he was dead, saying that he was guilty. Crippen, of England, a doctor a man of high standing, recognized ability and good reputation,

killed his wife because of infatuation for another woman, and put her remains away where he thought as this man thought, that it would never be discovered; but murder will out, and he was discovered, and he was tried, and he it said to the glory of old England, he was executed."

96. Movant further says that a new trial should be granted, because of the following ground:

The Solicitor General, in his concluding argument, spoke to the jury as follows:

" But to crown it all,in this table which is now turned to the wall, you have Lemmie Quinn arriving, not on the minute, but to serve your purposes, from 12;30 to 12;32" (referring to a table which the defendant's counsel had exhibited to the jury giving as was claimed by counsel, in chronolqgical order, the happening of events as to defendant on April 26) "but that, gentlemen, conflicts with the evidence of Freeman and the other young lady, who placed Quinn by their evidence, in the factory before this time".

Whereupon the following occurred:

"Mr. Arnold, There isn't a word of evidence to that effect; those ladies were there at 11:35 and left at 11:45, Corinthia Hall, and Miss Freeman, they left there at 11:45, and it was after they had eaten lunch and about to pay their fare before they ever saw Quinn, at the little cafe, the Busy Bee,He says that they saw Quinn over at the factory before 12, as I understood it."

" Mr. Dorsey: Yes sir, by his evidence".

". Mr. Arnold: That's absolutely incorrect, they never saw Quinn there then, and never swore they did."

Mr. Dorsey (resuming): "No, they didn't see him there, I doubt if anybody else saw him there either."

". Mr. Arnold, If a crowd of people here laughs every time we say anything, how are we to hear the Court? He has made a whole lot of little mis-statements, but I let those pass, but I am going to interrupt him on every substantial one he makes He says those ladies saw Quinn, [illegible] before 12, and I say he wasn't there, and they didn't say that he was there then."

"The Court: What is it you say, Mr. Doresy?

" Mr. Dorsey, I was arguing to the jury the evidence."

"The Court: Did you make a statement to that effect?"

"Mr. Dorsey, I made a statement that those two young ladies say they met Holoway as he left the factory at 11:05--I make the statements that as soon as they got back down to that Greek cafe, Quinn came in and said to them, 'I have just been in and seen Mr. Frank'".

". Mr. Arnold: They never said that, they said they met Holloway at 11:45, they said at the Busy Bee cafe, but they met Quinn at 12:30"

"Mr. Dorsey, Well, get your record, you can get a record on almost any phase, this busy Quinn was blowing hot and blowing cold, no man in God's world knows what he did say, but I got his affidavit there."

" Mr. Arnold: I have found that evidence, now, Mr. Dorsey, about the time those ladies saw Quinn."

". Mr. Doresy: I'll admit he swore both ways"

". Mr. Arnold, No, he didn't either. I read from the evidence of Miss Corinthia Hall; Then Mr. Dorsey asked her: 'Then you say you saw Lemmie Quinn right at the Greek cafe at five minutes to twelve, something like that? A. No sir, I don't remember what time it was when I saw him, went into the cafe, ordered sandwiches and a cup of coffee, drank the coffee and when we were waiting on the change he came in'. And further on, 'All he said (Quinn) was he had been up and had seen Mr. Frank, that was all he said? A. Yes sir', and so on. Now the evidence of Quinn: 'What sort of clock was that? 'he's telling the time he was at DeFoor's pool parlor--'What sort of clock was that?" A Western Union clock. Q. What did the clock say when you looked at it? A. 12:30'. And he also swore that he got back to the pencil factory at 12:30, that's in a half dozen different places".

"The Court: Anything contrary to that record. Mr. Dorsey?

". Mr. Dorsey: Yes, sir, I'm going to show it by their own table that didn't occur-- that don't scare anybody and don't change the facts."

The Court erred, under the foregoing facts, in not restraining

the solicitor general from making the erroneous statements of fact objected to by the defendant's counsel which the evidence did not authorize, and in permitting him to proceed, and in not rebuking the Solicitor General, and in not stating to the jury that there was no such evidence as the Solicitor General had stated, in the case, and defendant says that for this improper argument, and for this failure of the Court, there should be granted a new trial.

97. Movant further says that a new trial should be granted because of the following:

In his concluding argument Solicitor General Dorsey, referring to the defendant's wife, and referring to the claim made by the Solicitor General that the defendant's wife had not visited him for a certain time after he was first imprisoned, told the jury:

" Do you tell me that there lives a true wife, conscious of her husband' innocence, that wouldn't have gone through snapshotters, reporters and everything else, to have seen him"--

Whereupon the following colloquy ensued.

"Mr. Arnold. I must object to as unfair and outrageous an argument as that that his wife didn't go there through any consciousness of guilt on his part, I have sat here and heard the unfairest argument I have ever heard, and I can't object to it, but I do object to his making any allusion to the failure of the wife to go and see him; it's unfair, it isn't the way to treat a man on trial for his life".

"The Court: Is there any evidence to that effect?

"Mr. Dorsey: Here is the statement I have read."

"Mr. Arnold: I object to his drawing any conclusions from his wife going or not going, one way or the other,- it's an outrage upon law and decency and fairness."

" The Court, Whatever was in the evidence or the statement I must allow it."

Mr. Dorsey, (resuming): "Let the galled jade wince"

"Mr. Arnold: I object to that, I'm not a 'galled jade', and I've got a right to object. I'm not galled at all, and that statement is entirely uncalled for."

"The Court: He has got the right to interrupt you".

" Mr. Dorsey: You've had your speech".

". Mr. Rosser: And we never had any such dirty speech as that either".

". Mr. Dorsey: I object to his remark, Your Honor, I have a right to argue this case."

". Mr. Rosser: I said that remark he made about Mr. Arnold, and Your Honor said it was correct: I'm not criticising his speech I don't care about that."

Mr. Dorsey (resuming): "Frank said that his wife never went back there because she was afraid that the snapshotters would get her picture,-because she didn't want to go through the line of snapshotters. I tell you, gentlemen of the jury, that there never lived a woman, conscious of the rectitude and innocence of her husband, who wouldn't have gone to him through snapshotters, reporters and advice of any Tabbi under the sun. And you know it."

Movant says that the Court erred in not taking positive action, under the circumstances aforesaid, and in not restraining the Solicitor General from making his unfounded and unjust inferences from the alleged failure of the defendant's wife to visit him, which was not authorized by the evidence in the case, and erred in allowing the Solicitor General to argue upon this subject at all, and erred in not admonishing the jury that such argument could not be considered and should have no weight with the jury and the Court erred in not rebuking the Solicitor General for making the reply which he made to the interruption, to the effect "Let the galled jade wince", and erred in not rebuking the Solicitor General for such unjust comments upon a merited interruption, and because of such failures of the Court, and because of the aforesaid erroneous, unjust and unfounded argument of the Solicitor General, movant says that a new trial should be granted.

98. Movant says that a new trial should be granted because of the following:

The Solicitor General, in his concluding argument to the jury, spoke as follows:

"If there be a negro who accuses me of a crime of which I am innocent, I tell you, and you know It's true.

I'm going to confront him, even before any attorney, no matter who he is, returns from Tallulah Falls, and if not then, I tell you just as soon as that attorney does return, I'm going to see that that negro is brought into my presence, and permitted to set forth his accusations. You make much here of the fact that you didn't know what this man Conley was going to say when he got on the stand. You could have known it, but you dared not do it."

Whereupon the following colloquy ensued:

". Mr. Rosser: May it please the Court, that's an untrue statement; at that time, when he proposed to go through that dirty farce, with a dirty negro, with a crowd of policemen, confronting this man, he made his first statement, his last statement, he said, and these addedas, nobody ever dreamed of them and Frank had no chance to meet them; that's the truth.

You ought to tell the truth; if a man is involved for his life; that's the truth".

Mr. Dorsey (resuming): It don't make any difference about your addendas, and you may get up there just as much as youwant to, but I'm going to put it right up to this jury---

"Mr. Rosser: May it please the Court, have I got the right to interrupt him when he misstates the facts?"

"The Court: Whenever he goes outside of the record".

"Mr. Rosser: Has he got the right to comment that Ihaven't exercised my reasonable rights?"

"The Court: No sir, not if he has done that/"

" Mr. Rosser, Nobody has got a right to comment on the fact that I have made a reasonable objection".

"Mr. Dorsey: But I'm inside of the record, and you know it, and the jury knows it. I said, may it please Your Honor, that this man, Frank, declined to be confronted by this man, Conley".

"Mr. Rosser: That isn't what I objected to, he said that at that meeting that was proposed by Conley, as he says, but really proposed by the detectives when I was out of the City, that if that had been met, I would have known Conley's statement, and that's not true, I would not have been any wiser about his statement than I was here the other day."

"The Court: You can comment upon the fact that he refused to meet Frank or Frank refused to meet him, and at the time he did it, he was out of the City".

"Mr. Arnold: We did object to that evidence, Your Honor, but Your Honor let that in".

"The Court: I know; go on".

Mr. Dorsey (resuming): "They see the force of it"--

".. Mr. Rosser: Is that a fair comment, Your Honor, if I make a reasonable objection, to say that we see the force of it?"

"The Court: I don't think that, in reply to your objection is a fair statement".

Mr. Dorsey, (resuming(Now, may it please Your Honor, if they don't see the force of it, you do".

". Mr. Rosser. I want to know, is Your Honor's ruling to be absolutely disregarded like that?"

"The Court: Mr. Dorsey, stay inside of the record, and quit commenting on what they say and do."

"Mr. Dorsey: I am inside of the record, and Your Honor knows that's an entirely proper comment."

"Mr. Rosser, Your Honor rules--he says one thing and then says Your Honor knows better..

"Mr. Dorsey: Your Honor knows I have got a right to comment on the conduct of this defendant."

"The Court, Of course you have, but when they get up and object, I don't think you have any right to comment on their objections as they are making them to the Court"

"Mr. Dorsey: I dont?"

"The court: No, I don't think so."

"Mr. Dorsey: Isn't everything that occurs in the presence of the Court the subject matter for comment?"

"The Court: No, I don't think you can comment on these things. You can comment on any conduct within the province of this trial, but if he makes an objection that's sustained, why, then you can't comment on that".

". Mr. Dorsey: Does your Honor say I'm outside of the record?

"The Court, No, I don't, but I say this, you can comment on the fact that Frank refused to meet this man, if that's in

the record, you have the right to do that".

Mr. Dorsey (resuming): "This man Frank, with Anglo-Saxon blood in his veins, a graduate of Cornell the superintendent of the pencil factory, so anxious to ferret out this murder that he 'phoned Schiff three times on Monday, April 28th, to employ the Pinkerton Detective Agency, this man of Anglo-Saxon blood and intelligence, refused to meet this ignorant negro, Jim Conley. He refused upon the flimsy pretext that his counsel was out of town but when his counsel returned, when he had the opportunity to know at least something of the accusations that Conley brought against this man, he dared not let him meet him".

Movant says that Court erred in allowing the Solicitor General to comment upon an alleged failure of the defendant to meet the witness Conley and erred, when the defendant's counsel objected and interrupted him, the same not being authorized by the evidence and erred in not stopping the Solicitor General, and erred in not making a decisive and unequivocal ruling that such comment was improper, and should not influence the jury, and further erred in allowing the Solicitor General to comment, as he did in the foregoing statement of facts, upon the interruption; and the Court expressly erred in ruling that the Solicitor General could comment upon the fact that Frank refused to meet Conley; and because of such failure and errors on the Court's part, and because of such improper and prejudicial argument by the Solicitor General, the movant says that a new trial should be granted him.

99. Movant further says that a new trial should be granted because of the following:

The Solicitor General in his concluding argument, referring to the visit of the defendant to Bloomfield's undertaking establishment, on April 27, made the following remarks to the jury".

"Frank says that he visited the morgue not only once but twice. If he went down there and visited that morgue, and saw that child and identified her body, and it tore him all to pieces, as he tells you it did, let any honest man, I don't care who he be, on this jury, seek to fathom the mystery of this thing: tell me why it was, except for the answer I give you, he went down there to view that body again. Rogers says he didn't look

at it. Black says he didn't see him look at it".

Whereupon the following occurred:

". Mr. Rosser, He is mistating the evidence. Rogers never said he didn't look at the body, he said he was behind him, and didn't know whether he did or not; and Black says he didn't know whether he did or not."

". Mr. Dorsey: Rogers said he never did look at that body".

". Mr. Arnold: I insist that isn't the evidence. Rogers said he didn't know, and couldn't answer whether he saw it or not and Black said the same thing".

Mr. Dorsey (resuming) : "I am not going to quibble with you. The truth is, and you know it, that when that man Frank went down there to look at that body of that poor girl, to identify her, that he never went in that room, and if he did look at her long enough to identify her, neither John Black nor Rogers nor Gheesling knew it. I tellyou, gentlemen of the jury, that the truth of this thing is that Frank never looked at the body of that poor girl, but if he did, it was just a glance, as the electric light was flashed on and immediately turned and went into another room".

"Mr. Rosser: There isn't a bit of proof that he went into another room, I object again, sir, there isn't a particle of proof of that".

" The Court: Look it up and see what was said".

" Mr. Dorsey: I know this evidence".

". Mr. Rosser: If your Honor allows it to go on, there's no use looking it up. He never said anything about going into another room"

"The Court: What is your remembrance about that."

Mr. Rosser: It isn't true. Your Honor."

"Mr. Dorsey: I challenge you to produceit"

"Mr. Rosser: There's no use to challenge it, if he goes on and makes the argument they make, those deductions for which there's no basis, but when he makes a mis-statement of the evidence, it's perfectly useless to go on and look it up, and we decline to look it up".

Mr. Dorsey: I insist that they look it up. I insist that I'm sticking to the facts".

Mr. Rosser: No you are not".

"The Court: Well, if you'll give me the record, I'll look it up. Mr. Haas, look that up, and see what is the fact about it".

"Mr. Dorsey: I know what Boots Rogers said myself".

"The Court: The jury knows what was said ".

"Mr. Dorsey: That's quibbling".

"Mr. Arnold: Is that correct, Your Honor?"

"The Court: No, that's not correct; whenever they object, Mr. Dorsey, if you don't agree upon the record, have it looked up, and if they are right and you know it, and you are wrong, or if they are wrong and you also know it, if they are wrong they are quibbling, and if they are right they are not quibbling. Now, just go on".

". Mr. Rosser: Now, the question of whether Boots said he went into that room is now easily settled". Mr. Rosser here read that portion of the cross examination of the witness Rogers stating that when Frank left the door of the undertaking room, he went out of his view.

Mr. Dorsey: Well, that's cross examination, aint it?"

"Mr. Rosser, Yes, but I presume he would tell the truth on cross examination, I don't know; he passed out of his view, he didn't say he went into a room".

"Mr. Dorsey: Correct me if I'm wrong. Boots Rogers said he didn't go where the corpse lay, and that's the proposition we lay down."

Mr. Rosser: That isn't the proposition either; now you made a statement that isn't true, the other statement isn't true Rogers said, that when he left 'he went out of my view', he was practically out of his view all the time. I was just trying to qoute the substance of that thing".

Mr. Dorsey, (resuming): "He wanted to get out of the view of any man who represented the majesty and dignity of the law, and he went in behind curtains or any old thing that would hide his countenance from these men. And he said on the leading examination"

"Mr. Rosser, I don't know what you led out of him, but on the cross he told the truth".

Movant shows that under the foregoing facts, the Court erred in not making any ruling at all, and erred in allowing the

Solicitor General to proceed with his illegal argument which was not founded on the evidence, and erred and in not rebuking the Solicitor General, and in not stating to the jury that the Solicitor General had mis-stated the evidence in the particulars objected to, and erred in not telling the jury that there was no evidence in the case that Rogers had sworn that defendant did not look at the body of Mary Phagan or that Frank went in another room, and because of the aforesaid errorsin acting and failing to act, on the part of the Court, and because of such illegal and improper argument of the Solicitor General a new trial should be granted.

100. Movant further says that a new trial should be granted because of the following.

The Solicitor General, in his concluding argument, spoke as follows to the jury, the subject under discussion being the whereabouts of the key to the elevator box on Sunday morning, April 27, the language of the Solicitor General being as follows

" Why don't they bring the fireman here who went around and gave such instructions? First, because it wasn't necessary, they could have cut the electricity off and locked the box. And second, they didn't bring him because no such man ever did any such thing, and old Holloway told the truth before he came to the conclusion that old Jim Conley was his nigger, and he saw the importance of the proposition that when Frank went there Sunday morning the box was unlocked and Frank had the key in his pocket".

Whereupon the following occurred:

"Mr. Rosser: You say Mr. Frank had the key in his pocket? No one mentioned it, that isn't the evidence: I say it was hung up in the office, that's the undisputed evidence".

"Mr. Dorsey, Holloway says when he got back Monday morning it was hung up in the office, but Boots Rogers said this man Frank--and he was sustained by other witnesses-when he came there to run that elevator Sunday monring, found that power box unlocked."

"Mr. Rosser, That's not what you said".

"Mr. Dorsey: Yes, it is".

"Mr. Rosser: You said Frank had the key in his pocket next

morning, and that isn't the evidence, there's not a line to that effect."

"The Court: Do you still insist that he had it in his pocket?"

"Mr. Dorsey: I don't care anything about that; the point of the proposition, the gist of the proposition, the force of the proposition is that old Holloway stated, way back yonder in May, when I interviewed him, that the key was always in Frank's office; this man told you that the power box and the elevator was unlocked Sunday morning and the elevator started without anybody going and getting the key".

"Mr. Rosser: That's not the point he was making; the point he was making, to show how clearly Frank must have been connected with it, he had the key in his pocket. He was willing to say that, when he ought to know that's not so."

"The Court: He's drawing a deduction that he claims he's drawing".

"Mr. Rosser: He doesn't claim that. He says the point is it was easily gotten in the office, but that's not what he said."

"The Court: You claim that's a deduction you are drawing?"

"Mr. Dorsey: Why, sure".

"The Court, Now, you don't claim the evidence shows that?"

"Mr. Dorsey: I claim that the power box was standing open Sunday morning".

"The Court: Do you insist that the evidence shows he had it in his pocket?"

"Mr. Dorsey: I say that's my recollection, but I'm willing to waive it, but let them go to the record, and the record will sustain me on that point, just like it sustains me on the evidence of this man Rogers, which I'm now going to read."

Movant says that the Court erred in not rebuking the Solicitor General for the foregoing improper argument, which was not [illegible] evidence, and erred in not stating to the jury that there was no evidence that Frank had the key in his pocket, and in allowing the Solicitor General to proceed unrebuked and uninterrupted with said illegal argument, and in not making a square

and decisive ruling, upon the objection of the defendant, and in allowing the Solicitor General to proceed with said claim that Frank had the key in his pocket, as a deduction, the same being totally unwarranted; and for said illegal and erroneous actions and failure to act, by the Court, and for said illegal and improper argument, a new trial should be granted.

101. Movant says that a new trial should be granted, because of the following:

The Solicitor General, in his concluding argument, in referring to the testimony of the physicians introduced by the defendant, spoke as follows:

" It wouldn't surprise me if these able, astute gentlemen, vigilant as they have shown themselves to be, didn't go out and get some doctors who have been the family physicians and who are well known to some of the members of this jury, for the effect it might have upon you".

Whereupon the following colloquy occurred.

". Mr. Arnold, Ther's not a word of evidence as to that, that's a grossly improper argument, and I move that that be withdrawn from the jury".

"Mr. Dorsey: I don't state it as a fact, but I am suggesting it."

"Mr. Arnold, He has got no right to deduct it or suggest it, I just want Your Honor to reprove it, --reprimand him and withdraw it from the jury, I just make the motion, and Your Honor can do as you please".

Mr. Dorsey (resuming); "I am going to show that there must have been something besides the training of these men, and I'm going to contrast them with our doctors."

". Mr. Arnold: I move to exclude that as grossly improper. He says he's arguing that some physician was brought here because he was the physician of some member of the jury, it's grossly unfair and it's grossly improper and insulting even, to the jury".

Mr. Dorsey: I say it's eminently proper and absolutely a legitimate argument".

"Mr. Arnold: I just record my objection, and if your honor let's it stay in, you can do it." 168.

". Mr. Dorsey: Yes sir: That wouldn't scare me, Your Honor."

"The Court: Well, I want to try it right, and I suppose you do, Is there anything to authorize that inference to be drawn?"

". Mr. Dorsey: Why, sure, why the fact that you went out and got general practitioners, that know nothing about the analysis of the stomach, know nothing about pathology".

"The Court, Go on, then"

"Mr. Dorsey: I thought so."

". Mr. Arnold: Does Your Honor hold that is proper,'I thought so?'"

"The Court: I hold that he can draw any inference legitimately from the testimony and argue it, I don't know whether or not there is anything to indicate that any of these physicians was the physicians of the family".

"Mr. Rosser, Let me make the suggestion, Your Honor ought to know that before you let him testify it."

"The Court: He says he don't know it, he's merely arguing it from an inference he has drawn."

Mr. Dorsey (resuming): "I can't see any other reason in God's world for going out and getting these practitioners, who have never had any special training on stomach analysis, and who have not had any training with the analysis of tissues, like a pathologist has had,except upon that theory."

Movant shows that the Court erred in not rebuking the Solicitor General for making such improper argument which was not authorized by the evidence and in not stating to the jury that there was not a particle of evidence to the effect that any of the physicians were family physicians of any of the jurors, or that any of the physicians were put upon the stand for the effect it might have upon them for such reason; and the Court erred in allowing the Solicitor General to proceed with such improper, unwarranted and highly prejudicial argument, and erred in allowing the Solicitor General to comment, as the foregoing colloquy shows, upon the well merited interruptions by defendant's counsel, for such erroneous actions and failures to act by the Court, and for such illegal, unfounded and prejudicial argument, the defendant says that a new trial should be granted.

102. Movant further says that a new trial should be granted

because of the following:

The Solicitor General in his concluding argument, in referring to act of Judge Roan, discharging the witness, Conley, from custody, stated:

"Judge Roan did it, no reflection on the Sheriff, but with the friends of this man Frank, pouring in there at all hours of the night, offering him sandwiches and whiskey and threatening his life, things that this Sheriff, who is as good as the Chief of Police but no better, couldn't guard against because of the physical structure of the jail, Jim Conley asked, and His Honor granted the request, that he be remanded back into the custody of the honorable men who manage the police department of the City of Atlanta,".

Whereupon the following occurred:

"Mr. Rosser, No, that's a mistake, that isn't correct, Your Honor discharged him from custody, he said that under that petition Your Honor sent him back to the custody where you had him before, and that isn't true, Your Honor discharged him vacated the order, that's what you did."

". Mr. Dorsey, Here's an order committing him down there first you are right about that, I'm glad you are right one time".

". Mr. Rosser, That's more than you have ever been ".

Mr. Dorsey (resuming): "No matter what the ~~outcome of the order~~ may have been, the effect of the order passed by his His Honor, Judge Roan, who presides in this case, was ~~to remand him into the~~ custody of the police of the City of Atlanta".

"Mr. Rosser, I dispute that, that isn't the effect of the order passed by His Honor, the effect of the order passed by his Honor was to turn him out, and they went through the farce of turning him out on the street and carrying him right back That isn't the effect of Your Honor's judgment. In this sort of case, we ought to have the exact truth".

"The Court, This is what I concede to be the effect of that ruling, I passed this order upon the motion of State's counsel first, is my recollection, and by consent of Conley's atty."

"Mr. Rosser, I'm asking only for the effect of the last one".

"The Court.On motion of State's counsel, consented to by Conley's attorney, I passed the first order, that's my recollection Afterwards, it came up on motion of the Solicitor General, I vacated both orders, committing him to the jail and also the order, don't you understand, transferring him; that left it as though I had never made an order, that's the effect of it."

Mr. Rosser: Then the effect was that there was no order out at all? "

"The Court, No order putting him anywhere" ". Mr. Rosser: Which had the effect of putting him out?"

"The Court; Yes, that's the effect, that therewas no order at all".

Mr. Dorsey (resuming) "First, there was no order committing him to the common jail of Fulton County; second, he was turned over to the custody of the police of the City of Atlanta, by an order of Judge L. S. Roan, Third, he was released from anybody's custody, and except for the determination of the police force of the City of Atlanta, he would have been a liberated man, when he stepped into this Court to swear, or he would have been spirited out of the State of Georgia, so his damaging evidence couldn't have been adduced against this man".

The Court erred in allowing the Solicitor General to make the foregoing argument, over objection, which was not authorized by the evidence, and in not rebuking and correcting the Solicitor-General, and because of such failure to act, and erroneous actions, by the Court, and because of such improper and illegal argument, movant says a new trial should be granted.

103. Because the Court erred in failing to charge the jury, in reference to the witness, Jim Conley, that if the witness wilfully and knowingly swore falsely as to a material matter, his testimony ought to be disregarded entirely, unless corroborated by the circumstances, or the testimony of other unimpeached witnesses.

[illegible] believed from the evidence, that Conley watched for Frank, and that his purpose in watching was to assist in the commission of the crime of sodomy by Frank upon the person of Mary Phagan, sodomy being a felony, that than, Conley as to any alleged murder

committed in the progress of any such attempt to commit sodomy, would be an accomplice; and the jury could not give credit to his testimony, unless corroborated by the facts and circumst ances, or by another witness.

Rosser and Brandon,

Herbert J. Haas,

Reuben R. Arnold,

Movants Attorneys