

• • • • •

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

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

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

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

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

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

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

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

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

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