a prisoner binds himself by an agreement which he is competent to make, it is entered on the record as his immediate act; and this is a sufficient reason why he should be in Court to do those things which his counsel could not do for him. It is unnecessary, however, to speak of delegated authority; for *the right of a prisoner to be present at his trial is inherent and inalienable.* The record before us, therefore, is erroneous; but we direct that the prisoners be held to answer a fresh indictment."

SOUTH CAROLINA.

State v. Atkinson, 40 S. C. 363, 42 Am. St. Rep. 877.

In *State* v. *Atkinson, 40 S. C. 363*, the court said on page 368:

"The right of the accused to be present during every stage of his trial for a capital felony has long been settled, and is still fully recognized."

TENNESSEE.

State v. France, 1 Overt. 434.
Andrews v. State, 2 Sneed 550.
Clark v. State, 4 Humph. 254.
Hutchins v. State, 3 Coldw. 95.
Stewart v. State, 7 Coldw. 338.
Percer v. State, 118 Tenn. 765, 103 S. W. 780.

In *State* v. *France, 1 Tenn. 434*, it is said in the 2nd headnote:

"In criminal cases affecting life or liberty, the accused must be at the bar when the verdict is rendered."

The court said in the opinion:

"Per Curiam. The prisoner must be at the bar otherwise the jury cannot be asked for their ver-

dict, and if he does not appear the jury must be discharged without rendering any; and by Overton, J.: In every case affecting life or limb the accused must not only be present when the evidence is given in, but during the trial and on return of the verdict."

In *Andrews* v. *State, 2 Sneed (Tenn.) 550,* the court said on page 552:

"In criminal cases of the grade of felony, where the life or liberty of the accused is in peril, he has the right to be present, and must be present during the trial and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over his person to proceed with the trial or to receive the verdict, or to pronounce the final judgment."

"This rule, founded in the justice and wisdom of the common law, is in substance reiterated in our bill of rights; it is necessary to the full and free exercise of the right of the accused to make his defense; and in case he be legally convicted, that effect may be given on his person, to the judgment of the court."

In *Clark v. The State, 4 Humphreys (Tenn.) 254,* the court said in the headnote:

"In cases of felony and treason the verdict must be delivered in open court in the presence of the prisoner, and, therefore, a verdict rendered, on the trial of a defendant for perjury, in his absence, he having been permitted to go at large during the trial and not having appeared, although called, cannot be sustained."

In *Hutchinson v. The State, 3 Caldwell (Tenn.) 95*, the court said in the headnote:

"Appeal. In felonies, the defendant must give bond to appear before the Supreme Court. A court of error has no jurisdiction to try a defendant for a felony, unless he is present in person."

In *Stewart v. The State, 7 Caldwell (Tenn.) 338*, the court said in the 2nd headnote:

"The absence of a prisoner, (who is found guilty of a felony,) when a jury returns their verdict into court, renders the verdict and judgment against him, void."

In *Percer v. State, 118 Tenn. 765*, the court said in the 3rd and 5th headnotes:

"3. The accused is deprived of his fundamental and constitutional right to be present in court during his trial, where, when the verdict of guilty in a murder trial was announced, he was in a room adjoining the courtroom handcuffed to another prisoner, not in sight of the judge and all the jurors, and the view through the doorway was obstructed by the sheriff standing therein and holding the door open."

"5. The right of the accused to be present in the courtroom when the verdict of guilty is announced in a felony case is so fundamental that it cannot be waived by the failure of his counsel to make objection to the rendition of the verdict until the accused can be present."

TEXAS.

Shipp v. State, 11 Tex. App. 46.

Massey v. State, 31 Tex. Cr. Rep. 371, 20 S. W. 758.

Hill v. State, 54 Tex. Crim. Rep. 646, 114 S. W. 117.

In *Shipp v. State, 11 Tex. App. 46*, the 2nd headnote was in part as follows:

"The Code of procedure, article 698, expressly directs that the defendant in a felony case shall be personally present in court on certain occasions, of which one is when the jury return into court for further instructions. *Held*, that in the absence of the defendant his counsel cannot waive his right to be personally present on such occasions, and no waiver can be inferred from the silence of counsel for the defense while instructions are being given to the jury in the defendant's absence, nor from the counsel's excepting to the purport of the instructions."

The case of *Massey v. State, 31 Tex. Cr. Rep. 371*, has already been referred to with extensive quotations.

The 3d headnote of the case of *Hill* v. *State, 54 Tex. Crim. Rep. 646*, was as follows:

"3. Upon trial for murder it was reversible error to permit the reproduction of certain testimony on request of the jury, in the absence of the defendant who was on bail; and this, although his counsel waived defendant's presence and said they would not take any advantage of defendant's absence, and although defendant was voluntarily absent; the first section of the act of the Thirtieth Legislature requiring his personal presence at the trial."

In *Derden* v. *State, 56 Tex. Cr. Rep. 396, 402 S. C. 120 S. W. 485*, the Court said:

"Under the uniform holding of this court we are not permitted to inquire as to how far appellant was injured by being deprived of the right to be present. It is sufficient to say that he had a right

to be present, and that he must be present, when the verdict was received, unless his absence is voluntary or wilful. The statute gives the accused the right to witness the proceedings, to hear the verdict, to poll the jury, and he has, as well the right to inspect such verdict and make any legal objection to it. If we should undertake to sustain the proceedings of the court below on the proposition that no harm was done and that appellant's counsel were able to represent and do all for him that he could himself do, if present, this would be equally available in every case, and would have the effect to absolutely nullify the statute."

VIRGINIA.

Sperry v. Commonwealth, 9 Leigh 623, 33 Am. Dec. 261.
Hooker v. Commonwealth, 13 Watt. 763.
Jackson v. Commonwealth, 19 Gratt. 656.

The 1st headnote of *Sperry* v. *Commonwealth, 9 Lee 623*, was:

"Prisoner accused of felony must be arraigned and plead in person; and in all subsequent proceedings he must appear in person and by attorney."

In *Hooker* v. *Commonwealth, 13 Gratt. 763*, the record failed to show the presence of the defendant throughout the trial. The court said in part:

"It is the right of any one when prosecuted on a capital or criminal charge, 'to be confronted with the accusers and witnesses' and it is within the scope of this right that he be present not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected."

In *Jackson* v. *Commonwealth, 19 Gratt. 656*, the Military Court of Appeals, in 1870 said in the 1st headnote:

"1. Upon a trial for felony it is the right of the prisoner, a right which he cannot waive, to be present from the arraignment to the verdict. And if the evidence of a witness on the trial, which has been reduced to writing, or any part of it, is read to the jury in the absence of the prisoner, it is error, for which the verdict will be set aside."

WEST VIRGINIA.

State v. Greer, 22 W. Va. 800.

State v. Stevenson, 64 W. Va. 392, 19 L. R. A. N. S. 713.

State v. Sutter, 71 W. Va. 371, 76 S. E. 811, 43 L. R. A. 811, 43 L. R. A. N. S. 399.

In *State* v. *Greer, 22 W. Va. 800*, the court said in the 7th and 8th headnotes:

"7. Proceeding in a trial in the absence of the prisoner in a felony case is fatal to the verdict. It is absolutely necessary, that the prisoner shall be present in court, when anything is done in his case in any way affecting his interest."

"8. Where in a murder trial the state proceeded to cross-examine a witness during the absence of the prisoner, the verdict will be set aside, although the court, when the prisoner was present, instructed the jury to disregard the evidence, and the state proceeded to ask the same questions of the witness and received the same answers."

In *State* v. *Stevenson, 64 W. Va. 392*, there was a plea of guilty of murder in the first degree. In order to advise himself the judge proceeded to question the witnesses. The 2nd headnote was as follows:

"2. It is error to the prejudice of the prisoner's legal rights for the court, after receiving the prisoner's plea of guilty of murder in the first degree, and, before pronouncing judgment thereon, to proceed in the absence of the prisoner to examine witnesses and hear from the special judge who presided at the time of receiving such plea statements respecting the circumstances and facts of the killing, whether such examination be for the personal satisfaction of the judge pronouncing the judgment of the court or to advise him as to the character of judgment that should be pronounced on said plea."

In *State* v. *Sutter, 71 W. Va. 371*, it was held in the 3d headnote:

"3. Upon a trial for felony after close of the evidence, the judge and the attorneys for both sides go into another room, leaving the accused and the jury in the court room, and in that other room a motion to strike out the evidence of a state witness is made by the accused, and argued, and decided against the accused. On discovery of the absence of the accused, he is sent for, and the judge offers to allow him to again make such motion and argue it, but the accused declines to do so. Such absence of the prisoner demands a new trial."

WISCONSIN.

French v. State, 85 Wisc. 400, 39 Am. St. Rep. 855, 21 L. R. A. 402.

In *French* v. *State, 85 Wisc. 400*, the 3d headnote was:

"3. A conviction of murder cannot be sustained when neither the minutes of the clerk nor the record shows that the prisoner was present in court when the verdict of guilty was rendered,

or that he was present when the sentence was pronounced against him, or immediately before, or that he was asked by the court if he had anything to say why he should not be so sentenced."

COURT OF CLAIMS.

In *Weirman* v. *United States, 36 Court of Claims Rep. 236,* Chief Justice Nott said:

"The petition in this case avers that the defendants were indebted to the claimant for a balance of seaman's wages, and that the money is withheld by reason of the sentence of a naval court-martial. The petition then goes on to state that this court-martial was convened on board the U. S. S. Texas, April 14, 1897, and that the claimant was absent from the court during one day's proceedings. The petition then negatives the condition which would have justified a prisoner's absence from a court-martial by saying that during this day of absence the judge-advocate was present throughout said session, that it was not a secret one, or closed for the purpose of any vote, deliberation, opinion, or sentence. The petition then, probably with intent to put the whole case before the court, concedes that the claimant and his counsel, who was a naval lieutenant, would have been permitted to be present had either applied for leave, and that neither objected to the absence of either, and neither was present; that the assembling of a court-martial on that day was otherwise in conformity to order. The question, therefore, presented is whether the absence of a prisoner or his counsel for one day during the sitting of a court-martial without request to be present or objection to the court's sitting without the presence of the prisoner renders the sentence of the court void.

"The counsel for claimant relies, among other authorities, upon the decision of the Supreme Court of Kentucky in *Allen* v. *The Commonwealth* (86 Ky. R. 643), in which there is a long

array of authorities cited, and in which it is held that 'in cases of felony, the accused has the right to be present, and must be present during the whole of the trial, and until the final judgment;' and upon a case in 55 N. Y. R. 35, where is is held 'that every court is composed of three constitutional parts, the plaintiff, the defendant, and the judicial power to examine the facts, determine the law, and apply the remedy.'

"The claimant also cites the decision of the Supreme Court in *Lewis* v. *United States* (146 U. S. R. 370, 372): 'A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed, yet in felonies it is not in the power of the prisoner, either by himself or by his counsel, to waive the right to be personally present during the trial. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his said plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence. (*Prine* v. *The Commonwealth, 18 Penn. St. 103, 104, per Gibson, C. J.*) And it appears to be well settled that where the personal presence is necessary in point of law the record must show the fact.'

"Chief Justice Cooley states the rule with characteristic clearness and precision: 'In cases of felony, where the prisoner's life or liberty is in peril, he has *the right* to be present, and must be present, during *the whole* of the trial, and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over the person, and the court can not proceed with the trial, or receive the verdict, or pronounce the final judgment.' (Cooley's Const. Limitations, p. 319.)

"It is manifest that a prisoner in custody is not a free agent, who may walk in or out of court as it may please him. His being in court depends

upon proper authority bringing him there. It cannot, therefore, be said that he waives anything by his absence.

"In a civil court the accused may be out on bail, and, ordinarily, must be represented by counsel, who can watch his interests more effectively than he can himself. If it is desirable or necessary that the prisoner in a civil court be present at every proceeding after indictment, it seems to be still more so that a prisoner before a court-martial should be present, for he ordinarily is not represented by counsel learned in the law and watchful of his interests, but (as in this case) by some naval officer acting from a humane motive. Undoubtedly in the past court-martials have been harsh and arbitrary tribunals. The tendency of modern law has been to restrict their powers and curtail their discretion. This is well summed up by the New York Court of Appeals: 'The power of courts-martial was formerly more extensive than now, and was often exercised in the most arbitrary manner. Blackstone denounced this unlimited power by contrasting it with the certainty and precision of the common law, and expressed his sympathy with those who were subject to their jurisdiction in the following forcible paragraph: 'How much, therefore, it is to be regretted that a set of men whose bravery has so often preserved the liberties of their country should be reduced to a state of servitude in the midst of a nation of freemen.' (3 Blackstone, 416.) The power of these courts has been very much restricted and limited since that period, and it is not strange that some of their more rigorous practices should be also modified in a country making still higher pretensions to freedom.' (*People ex rel. Garling* v. *Van Allen, 55 N. Y. R. 31, 35.*)

"With such an array of authorities this court cannot entertain a doubt concerning the general principle above set forth."

COMMON LAW AUTHORITIES AND TEXT WRITERS.

Coke upon Littleton, 227 b.

"But in criminal cases of life or member, the jury can give no privy verdict, but they must give it openly in court."

2 Hale's Pleas of the Crown 300.

"In a case of felony or treason the verdict must be given in open court, and no privy verdict can be given.' Co. Lit. 227 b. Co. P. C. 110."

Dominus Rex. v. Ladsingham, *Sir T. Raym, 193* (1671.)

"An information was exhibited against Mr. Landsingham of Devonshire, lord of a manor there, for oppressing his tenants, and for several misdemeanors; and upon Not Guilty pleaded, he was found guilty; and Stroud moved to set aside the verdict because unduly given. The information being laid in Devonshire, and the trial there, and yet the jury gave a privy verdict in the county of the city of Exeter which was illegal. 1. To give a privy verdict in a criminal cause, contrary to Coke upon Litt. 227, b. 2. To give the verdict out of the county. But to both these the Court answered thus. To the first. 'Tis intended that no privy verdict can be given in criminal cases which concern life, as felony, *because the jury are commanded to look upon the prisoner when they give their verdict, and so the prisoner is to be there present at the same time;* but in criminal cases, where the defendant is not to be personally present at the time of the verdict a privy verdict may be given. And as to the second. Custom hath always been to give the verdict in that place; and the court did not think the first point fit to be

moved, because contrary to the record, but however they resolved as before."

4 Blackstone's Commentaries, 360.

"When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict; but are to consider of it, and deliver it in, with the same forms as upon civil causes; *only they cannot, in a criminal case which touches life or member, give a privy verdict. 2 Hal. P. C. 300. 2 Hawk. P. C. 439.*"

1 Chitty Cr. L. 636.

"*Of the verdict.* The verdict whatever may be its effect, must, in all cases of felony and treason be delivered *in the presence of the defendant,* in open court, and cannot be either privily given, or promulgated *while he is absent. Co. Lit. 227, b.;* 3 Inst. 110; *Sir T. Raym. 193; 2 Hale 300; Hawk.* p. 2, c. 47, s. 2; 4 Bla. Com. 360. *Bac. Abr. verdicts, B. Burn, J. Jurors, V. Williams, J. Juries, VII.*"

Bacon's Abridgement, Title "Verdict," page 308.

"It is in one book laid down, that a privy verdict cannot be given in a case of life or member. 1 Inst. 227.

"In two other books it is laid down, that a privy verdict cannot be given in a case of felony; because the jury are directed, and ought, in such case, to look upon the prisoner when they give their verdict."

Raym. 193, Rex v. *Ladsingham; 1 Ventr. 97.*

2 Barbour's Criminal Law 365.

"*Verdict.* The verdict in all cases of felony and treason must be delivered in open court *in the presence of the defendant.*"

Archbold's Crim. Pl. & Ev. 23d Ed., p. 186.

"No trial for felony can be had except *in the presence of the defendant,* and he must, it is said, stand in the dock to be tried."

R. v. *St. George, 9 C. & P. 483.*
R. v. *Douglas, C. & Mar. 193.*
R. v. *Zulueta, 1 C. & K. 215.*

Ibid, p. 214.

"On a trial for treason or felony the jury must deliver their verdict in open court, *in the presence of the defendant.*"

R. v. *Haynes (1900) 64 J. P. 441.*

Abbott's Trial Brief (Criminal Causes) 2d Edition, 718.

"In felony the accused *must be present* when the verdict is rendered, and his counsel cannot waive the right."

Hughes' Criminal Law, §3370.

"*Presence of defendant essential.*—If the prisoner is deprived of the privilege of *being present* when the verdict is returned the verdict must be set aside and a new trial granted, or the judgment will be reversed."

Clark's Criminal Procedure, p. 423.

"In all criminal prosecutions, the defendant has a right *to be present during the entire proceedings,* from arraignment to sentence. *He cannot, according to the weight of authority, waive the privilege in cases of felony,* nor, according to some, but not all, of the authorities, in case of misdemeanor involving corporal punishment."

Wharton's Criminal Pleading and Practice, Eighth Edition, §741.

"*Defendant must be present.* At the time of the rendition of the verdict, as a general rule, the defendant must be present in court, *and in capital cases to take the verdict in his absence is a fatal error.*"

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IN THE SUPREME COURT OF THE UNITED STATES.

No. 775.

LEO M. FRANK, *Appellant*, *vs.* C. WHEELER MANGUM, *Sheriff*.	Appeal from the District Court of the United States for the Northern District of Georgia.

ABSTRACT OF CASE.

1. **Status of the case of the State of Georgia vs. Frank (insofar as same can be shown by reference to the record now before this Court) as it was when the Supreme Court of Georgia passed upon appellant's motion to set aside the verdict; and a comparison of this with the allegations in the application for writ of habeas corpus.**

Frank, the appellant, appeals from the decision of the District Court refusing to issue the writ of habeas corpus, and by his petition and the exhibits thereto attached, discloses the following:

That on May 24th, 1913, the grand jury of Fulton County, State of Georgia, indicted him for the murder of Mary Phagan. (Record, page 1, paragraph 3.)

On August 25, 1913, a jury rendered a verdict of guilty. (Record, page 1, paragraph 3.)

On August 26, 1913, said Frank, in conformity with the verdict, was sentenced to death. (Record, page 1, paragraph 3; also page 9.)

On August 26, 1913, Frank filed a motion for a new trial. (Record, page 5, paragraph 7; and page 44.)

This original motion was amended, the 31st of October, 1913, on which date the same was over-ruled. (Record, pages 219 and 220.)

It will be seen by reference to the judgment of the trial judge, namely, Hon. L. S. Roan, which appears at the bottom of page 219 of the Record, that affidavits submitted by the State were considered, and the language of this said order of October 31st, 1913, shows, which is a fact, that said affidavits submitted by the State are not a part of the foregoing motion and amended motion, the grounds of which were approved by the court in an order on said page 219, immediately preceding the order over-ruling the motion.

Thereafter this original motion for a new trial was taken on writ of error to the Supreme Court of Georgia, and by said court on February 17, 1914, judgment was rendered affirming the lower court. (Record, page 5, paragraph 8.)

In said paragraph 8, page 5, Frank in his application for habeas corpus says:

> "The opinion of the Supreme Court of Georgia is reported in Volume 141, Ga., page 243, and the same is hereby referred to."

On page 38 of the transcript of the record in the opinion of the Supreme Court of Georgia dealing with Frank's "Motion to set aside the verdict" rendered, which said motion Frank refers to on page 5, paragraph 9, this said opinion of the Supreme Court of Georgia being attached by Frank as an exhibit to his application for a writ of habeas corpus, the following statement is made, namely:

> "And moreover an extraordinary motion for a new trial was made and has likewise been refused and the judgment overruling it affirmed by this court. Frank vs. State. 142 Ga. —— (83 S. E. —)"

So it appears from the application that two motions, one the ordinary and the other an extraordinary motion for a

new trial, were filed by Frank and decided by the Supreme Court of Georgia before the decision of the Supreme Court on his motion to vacate the verdict was rendered.

On April 16, 1914 (Record, page 5, paragraph 9), Frank filed a motion in the Superior Court of Fulton County, Ga., to set aside the verdict rendered against him, said motion being on grounds set forth in paragraphs 4th, 5th and 6th of the application presented to the District Court. The decision of the Supreme Court on this application is fully set out in the transcript of the Record, beginning on page 22 and ending on page 39. This decision by the Supreme Court of Georgia was rendered Nov. 14, 1914. (Record, page 5, paragraph 11.)

On November 18, 1914, the Supreme Court of Georgia denied Frank a writ of error to the Supreme Court of the United States. (Record, page 7, paragraph 17.)

November 21, 1914, application for a writ of error was made to the justice of the Supreme Court of the United States assigned to the Fifth Circuit, and on November 23, 1914, said application was denied, whereupon a similar application was made to another justice, and on November 25, 1914, denied, and then again to the entire court, which on December 7, 1914, denied the same. (Record, page 7, paragraph 18.)

Briefly the foregoing recounts in chronological order the steps taken in the case against Frank and by Frank, and shows the status of the case at the time the application for a writ of habeas corpus was presented to and denied by his Honor, Judge William T. Newman, judge of the District Court of the Northern District of Georgia.

Appellant's contentions are based on the propositions that his trial in the particulars indicated did not conform to due process of law as guaranteed by the Constitution of the United States, and are set out in his application (page 8) and further disclosed more fully by his assignments of error on the petition for writ of habeas corpus which appears in the Record beginning on page 17, and also by his

assignments of error as filed in this court as shown in the Record beginning on page 226, said contentions being that he is now held in violation of Section One of the Fourteenth Amendment of the Constitution of the United States because of disorder on the part of the public attending the trial, and because, his presence having been expressly waived by his counsel, he was not present at the reception of the verdict. This waiver is disclosed by allegations on page 3, paragraph 5.

BRIEF OF ARGUMENT.

Counsel for appellee desire to present to this court the exact status of the Frank case, insofar as the same can be shown by reference to the Record now before the court, as it was when the Supreme Court of Georgia passed upon appellant's motion to set aside the verdict. (See page 22 of Record.)

In the amended motion for a new trial Frank submitted to that court certain grounds with reference to alleged disorder at his trial and asked the court to grant a new trial upon the same. In other words the following grounds of Frank's amended motion for a new trial dealt with and presented to that court as a basis for a new trial certain alleged acts of disorder on the part of the spectators attending the same, namely:

Ground 24 (Record, page 109).
Ground 38 (Record, page 117).
Ground 64 (Record, page 137).
Ground 65 (Record, page 140).
Ground 66 (Record, page 142).
Ground 75 (Record, page 147).

This application for a habeas corpus is based on almost identically the same allegations. (See paragraph 5, page 2.) The only difference between the questions submitted to the Courts of Georgia and the Federal Courts is that Frank

does not present to the Federal Courts as many grounds or as many instances of alleged disorder as he urged for a new trial in the State Court, but he has endeavored in his application to the Federal Court to enlarge his allegations as to the disorder with reference to the fewer instances which he does see fit now to present in this application.

We have already called the court's attention to the fact that the order of the trial court denying the motion for a new trial (page 219 of the Record) discloses the fact that the State by affidavits took issue with Frank with reference to certain grounds of his motion, and as a further evidence thereof the attention of the court is invited to the decision of the Supreme Court of Georgia, 141 Ga. 246, paragraphs 16 and 17 of the headnotes.

Also the court is invited to consider paragraphs 16 and 17 of the opinion in said case, said paragraphs to be found beginning on page 280. On page 280, in paragraph 16, the court says that "*rebutting proof was submitted by the State.*" It further appears from this opinion, and the paragraph cited, that only two instances referred to by Frank in his motion occurred within the hearing or knowledge of the jury, and this, furthermore, appears also from the grounds of Frank's amended motion as disclosed in the Record before this court. (See ground 38, page 117, and ground 65-c, page 141, and ground 65-b, page 141.)

No motion for a mistrial, it will be seen by reference to this Record, was ever made by counsel for Frank at the time said alleged disorder occurred, and where it occurred in the presence and knowledge of the jury.

Frank's counsel, as this Record now before this court discloses, never made any motion for a mistrial, where the alleged disorder occurred in the presence of the jury until sometime after the occurrence. In other words, when the alleged disorder of which they now complain occurred in the presence of the jury, they permitted it without then and there moving the court to declare a mistrial and without informing the court that the action which the court is

shown to have taken was insufficient, inadequate or unsatisfactory.'

In other words, counsel for Frank did not at any time, indicate to the court any dissatisfaction with the action that the court took at the time upon whatever complaint is shown to have been presented to the court, except in the two instances to which reference has been made.

The Supreme Court of Georgia, in 141 Ga. 280, paragraph 16, says:

> " . . . and presumably, from what otherwise appears in the Record, the action by the court was deemed satisfactory *at the time* and the orderly progress of the case was resumed without any further action *being requested.* The general rule is that the conduct of a spectator during the trial of a case will not be ground for a reversal of the judgment unless a ruling upon said conduct is invoked from the judge *at the time it occurs.*"

We will not cite the authorities relied on by the Supreme Court of Georgia but we will here propound this question to the Court:

Would this court, or would any court, have held differently with reference to such grounds?

Indeed, under the law would any court make a ruling to be followed as a precedent whereby a defendant in a criminal case would be permitted to do as Frank did, namely: make no motion, or express no dissatisfaction with what was done, spend about thirty days in the trial of a case, and then after conviction set aside the verdict?

And does not this court, from Frank's allegations and from the exhibits attached thereto, see that these matters could in no view of the law amount to a failure to give him a trial according to the law of the land?

We do not undertake to quote here all that is said by the Supreme Court of Georgia pertinent to these questions,

because we apprehend that the court will, for itself, read those paragraphs of the decision indicated.

On page 147 of the Record will be found ground 75 of the motion for a new trial. This ground dealt, among other things, with matters alleged to have occurred at the time when the verdict was brought in, and when Frank is shown not to have been present, as indicated by the following excerpt from that ground, to be found on page 148 of the Record, namely:

> "The defendant was not in the court room when the verdict was rendered, his presence having been waived by his counsel."

In connection with the allegations in the habeas corpus application, as found in paragraph 5, pages 2 and 3, paragraph 17 of the Supreme Court of Georgia, in 141 Ga. 281, is to be considered. In the first place this paragraph discloses that a request by Frank or his counsel, although he was absent, was made to poll the jury, and in the second place, it appears that the verdict was read and the polling had begun before the cheering began.

Passing from the allegations with reference to alleged disorder, let us see what the record shows concerning the failure of Frank to be present at the reception of the verdict.

In his application for a writ of habeas corpus, as we have previously shown in reference to another matter, page 3, paragraph 5, the following allegation occurs, namely:

> "He (the judge) requested my counsel to agree that I need not be present at the time that the verdict was rendered and the jury polled."

In ground 75 of his original motion for a new trial, on page 148 of this Record is found the following language, namely:

> "The defendant was not in the courtroom when

the verdict was rendered, his presence having been waived by his counsel. This waiver was accepted and acquiesced in by the court," etc.

It will be observed that there is some difference between the two statements. With reference to this incident, as we have already suggested to be the case with reference to the alleged disorder, the allegations of the application are put much stronger in behalf of Frank than was the case when he made the allegations embodied in the motion for a new trial.

The purpose in quoting the language of the 75th ground of the motion for a new trial is, however to show this court that Frank at least had knowledge of the waiver at the time he filed his amended motion for a new trial.

We submit as sound the proposition embodied in the following excerpt from the opinion of the Supreme Court of Georgia on Frank's motion to set aside the verdict, as same appears on page 38 of this Record, namely:

> "The defendant necessarily knew when sentenced by the court, for he was then present, that the verdict had been rendered against him. His counsel must have known it, for they filed his motion for a new trial. He and they are presumed to know the law."

It appears from the Record, page 9, that he was sentenced on the 26th of August, 1913, the day after the verdict was rendered.

On page 282 of the decision in the 141 Ga., the Supreme Court of Georgia in discussing the deductions of Frank made from the allegations of fact set out in ground 75, says:

> "We think that the affidavits of jurors submitted in regard to this occurrence were sufficient to show that there was no likelihood that there was any such result."

This quotation shows on the face of this Record that the jurors trying the case completely and absolutely negatived the allegations which are now made in this application by Frank to the effect that they were improperly influenced contrary to the law and the evidence and their oaths.

Frank presented also an extraordinary motion for a new trial and the same was over-ruled and denied. (See page 38 of the Record in this case, and 142 Ga.; also 83 S. E. Reporter, pamphlet No. 2, page 233. This decision refers to the case in the 141 Ga. 243, 80 S. E. 1016). The extraordinary motion was decided by the Supreme Court of Georgia October 14, 1914.

It is not disclosed when this extraordinary motion was filed, but it was presumably filed before or certainly at the time the motion to set aside the verdict was filed. But in any event it had been decided previous to the decision of the Supreme Court, to be found in this record on page 22. On the 26th of August, 1913, when Frank was first sentenced (page 9); on the 7th of March, 1914, when he was sentenced again (page 10), no mention was made of his not having been present at the rendition of the verdict. And the first time that said absence is mentioned was April 16, 1914. (See page 5.)

In other words, for over seven and nearly eight months, during which time he had been twice sentenced, had made two motions for a new trial, he had never presented to the State Courts or to the Federal Courts any proposition claiming a lack of due process of law in that he was not present when the verdict was rendered.

It is respectfully submitted that this state of facts warranted and demanded the conclusions reached by the Supreme Court of Georgia in the opinion on the motion to set aside, beginning on page 22 of this Record. And we respectfully submit that from this Record facts are shown which under no view of the law could be held to have justified any decision other than the one rendered by the Supreme Court of Georgia, and it is respectfully suggested

that on this Record with reference to this question of the absence of Frank at the reception of the verdict this court will hold that he was not denied any right guaranteed to him under the constitution and will not hold that the court lost jurisdiction or that he was not accorded a trial according to the law of the land.

Appellant, in his application, page 2, 5th paragraph, says:

> "It was apparent to the court that public sentiment seemed to be greatly against me."

On page 147, in the 75th ground of his motion for a new trial, he says:

> "Public sentiment seemed to the court to be greatly against me."

In the State of Georgia it is provided by statute, now to be found in Code of 1911, Sec. 964, as follows:

> *"Venue, When and How Changed"*: The defendant in any criminal case in the Superior Court may move by petition in writing for a change in venue, whenever in his judgment an impartial jury cannot be obtained in the county where the crime was committed. Upon the motion it shall not be necessary to examine all persons in the county where the crime is committed liable to serve on the jury, but the judge shall hear evidence by affidavits, or oral testimony, in support of or against the motion; and if, from the evidence submitted, the court shall be satisfied that an impartial jury cannot be obtained to try the case, the judge shall transfer it to any county that may be agreed upon by the solicitor-general and the defendant or his counsel, to be tried in the county agreed on. If a county is not thus agreed upon the judge shall select such a county as in his judgment will afford a fair and impartial jury to try the case, and have it transferred accordingly."

Later this statute was amended by the Act of the Georgia Legislature on August 21, 1911, to be found in Georgia Laws of 1911, pages 74 *et seq.*, providing that:

> "It shall be lawful for the judge of the Superior Court of the circuit in which a crime is alleged to have been committed to change the venue of the trial of the said case on his own motion, etc. . . ."

The Record no where discloses that Frank, though he was represented by several counsel, presumably in possession of a knowledge of the temper of the people of the community, ever made any motion to change the venue, and hence it is a fair inference that whatever antagonistic public sentiment, if any, was developed at the time the matters referred to in ground 75 of the motion occurred, was brought about and grew out of the character of the evidence and the case made by the State. Presumably, the judge did his duty, and presumably there was no antagonistic sentiment on the part of the public to Frank at the time he started into his trial, for had there been, presumably, the judge, under the authority of the statute cited, would have, of his own motion, changed the venue; and if not, then, presumably, the public sentiment, if any, claimed by Frank to have been manifest during the trial, was the natural outgrowth and consequence of the evidence adduced on the trial of Frank for the heinous crime of murder. Of course, we cannot go into the evidence adduced on the trial of Frank, because the appellant did not see fit to put it into the Record. But we do not deem it amiss to show from the transcript of the record made by Frank himself what the evidence of the State, when Frank was convicted, tended to show.

The Record now before this court shows evidence tending to prove—and indeed in view of the verdict ordinarily we would be authorized in insisting that it is conclusively proved that:

(a) Mary Phagan the deceased, was "a little girl" (See Record, page 129, ground 47).

"Mary Phagan would have been fourteen years old within a little more than a month, and was physically well developed for a girl of her age." (See 141 Ga., page 249).

(b) She was murdered and the evidence "tended to show that the sexual organ of the girl indicated external violence" . . . "From this testimony it was inferable that the slayer undertook to have some sort of relation or connection with her sexual organ, and possibly in an unnatural way" . . .

"A theory of the State, *which finds a basis in the evidence,* was that the murderer desired to have a sexual relation of some character natural or unnatural, with the deceased" (See 141 Ga. 125 and 156).

(c) "That Frank was the superintendent of the factory in which she worked. That he had previously endeavored to intrude himself upon the deceased" (See Record 129, ground 47).

(d) "That Frank was a man of general bad character for lasciviousness." (See Record, page 135, ground 56, and Record 144, page 70, and 141 Ga. 276.)

(e) "And that Frank was addicted to acts of perversion." (See Record, page 48 and ground 10 and Record, page 51, ground 13.)

The above citations showing the character of the evidence adduced on the trial of Frank have not been cited as we have previously indicated, to show this court his guilt, for this question, as we understand, is not before this court, but the purpose is to disclose that there was in the harrowing details of the crime much which was reasonably calculated to excite the indignation of law abiding citizens. If there were, as alleged, at this trial, which lasted nearly a month, isolated instances of disorder, would it be, the trial

occurring in a populous city (the constitution and laws of the State requiring it to be in public), any more than would naturally and ordinarily be expected. In each instance the court granted all the relief asked by counsel for Frank except to declare a mistrial.

2. **Appellant is asking this Court to grant him a writ of habeas corpus which will virtually overturn his conviction in the State Court without submitting to the United States Courts important portions of the record on which the judgment is based, and on which he is being held.**

In every motion for new trial a brief of the evidence is required. No motion for a new trial is complete without such copy of the brief of evidence.

Code of Ga. (1911) Section 6089.
"It is a part of the record." Code (1911) Sec. 6150.

It matters not that the grounds of the motion could be considered and determined without a reference to the evidence at all, or any part of it—the rule is the same; a brief of evidence cannot be dispensed with, and is a part of the motion.

Graddy vs. Hightower, 1 Ga. 253.
Roby vs. State, 74 Ga. 812.
Baker vs. Johnson, 99 Ga. 324.
Mize vs. Americus, etc., Co., 106 Ga. 140.
Holleman vs. Small, 111 Ga. 812.
Brooks vs. Proctor, 111 Ga. 835.

No brief of the evidence is attached as an exhibit to the application now before the court. The court therefore knows that the statement contained in the 7th paragraph of the application, on page 5 of the record, to the effect that a copy of the motion is exhibited herewith to the court, was not the complete motion.

And since in the order of the judge of the Superior Court overruling the motion for a new trial (see page 219 of the record), there is a recital that the judge considered affidavits submitted by the State; and since in the report of the case of Frank vs. State, 141 Ga. 243, and part on 141 Ga. 280 (this opinion being made a part of the record; paragraph 8 of the application, page 5 of the record) the judge distinctly states that rebuttal proof was submitted to the State on the hearing of the motion, this court knows that the entire record which the courts of Georgia passed on is not presented in Frank's application for habeas corpus.

Will not the Supreme Court of the United States indulge the presumption that attaches to the judgments and decrees of all courts of this character, to-wit.: that there was in these affidavits and in the brief of evidence facts which clearly justified the Superior Court and the Supreme Court of Georgia in its rulings, and when it appears, as it does from this application, that Frank is held under a judgment of the State court not void on its face and his application further discloses that the entire proceedings are not presented in his application for habeas corpus, will this court order a writ to issue based on such parts of the record of his conviction as he chooses to present to the court?

The Supreme Court of Georgia is second to no State in according trials free from hostile demonstrations—and has gone as far, we venture to assert, as any State in the union in setting aside verdicts where the same were influenced by hostile demonstration on the part of spectators.

Lang vs. Hopkins, 10 Ga. 37.
Monroe vs. State, 5 Ga. 139.
Mitcham vs. State, 11 Ga. 616.
Anderson vs. State, 14 Ga. 712.
McGuffie vs. State, 17 Ga. 497.
Martin vs. State, 38 Ga. 296.
Nesbit vs. State, 43 Ga. 238.
Hunter vs. State, 43 Ga. 516.

Westmoreland vs. State, 45 Ga. 279.
Stewart vs. State, 58 Ga. 577.
Hudgins vs. State, 61 Ga. 182.
Moon vs. State, 68 Ga. 696.
Turner vs. State, 70 Ga. 778.
Flanagan vs. State, 106 Ga. 109.
Turner vs. State, 111 Ga. 217.

In Georgia, it has frequently been held, that where a party does not have a fair and impartial trial, in the manner contemplated by law, which is guaranteed to him by the State Constitution, as well as the Constitution of the United States, no matter how strongly the evidence shows his guilt, it must for this reason be set aside and a new trial granted.

Daniel vs. State, 56 Ga. 654.
Smith vs. Lovejoy, 62 Ga. 373.
Woolfolk vs. State, 81 Ga. 551.
Collier vs. State, 115 Ga. 803.

But this is far from holding that whenever an accused *alleges* those things in a motion for new trial, the court should grant a new trial. Under our practice, a movant can *allege* as reasons why he contends a new trial should be granted him, whatever facts he pleases; but the State is permitted by affidavits to make a counter showing, and then the court that passes on his motion becomes as to such disputed facts a trior; and this was what was done in Frank's case. See the opinion of Mr. Justice Atkinson, 141 Ga., page 280.

3. The decision of the Supreme Court of Georgia holding that Frank had not adopted the correct procedure in invoking in the State Court the effect of his absence when the verdict was received was not the passage of an ex-post-facto law, but followed prior decisions.

On page 6, Paragraph 12, appellant says that:

"Under previous decisions of the Supreme Court

of Georgia and under the practice which had prevailed throughout the State prior to the aforesaid decision rendered in my case November 14, 1914, as aforesaid, the proper procedure to attack as a nullity a verdict rendered in the absence of a prisoner had been held to be a motion to set aside the verdict. A motion for a new trial was treated as not being a proper remedy."

We submit that this allegation is incorrect. We cite as against the word of appellant as above quoted the decision of the Supreme Court of Georgia as appended to his application, said decision beginning on page 22. But we invite counsel for appellant to produce any Georgia authority, *where the question was presented,* sustaining this claim.

On the other hand we will endeavor, by citing the decisions of the Supreme Court of Georgia, to convince the court that it has nowhere been held as Frank contends, but that all the previous decisions of the State Courts were in harmony with and supported the decision rendered by that court in reference to Frank's particular motion to set aside the verdict.

We therefore now discuss the Georgia decisions and the motion to set aside as it was presented to the Supreme Court of Georgia when they rendered the decision embodied in the transcript, for this court from this Record has before it certainly enough of what appeared to the Georgia Supreme Court to demand the same conclusion.

In

115 Ga. 232; Regopoulos,

it is decided that the fact that the list of witnesses, on whose testimony a charge against defendant was founded, was not furnished in response to the demand of the accused but an incorrect list instead was furnished, is not ground for a motion in arrest of judgment.

The attention of the court is called to the fact that under the Constitution of Georgia, Article 1, Bill of Rights, section 1, paragraph 5, it is said that every person charged with an offense against the laws of this State shall on demand be furnished with a list of the witnesses.

We think that had Frank moved in time—i. e., during the term—by a motion to set aside or vacate the verdict, which would have been in the nature of a motion for a new trial, and governed by all the rules of said motion except as to a plea of former jeopardy, he would have made a motion recognized perhaps by the laws and which, if sustained under the facts and the law, would have enabled him to have set up on a second trial former jeopardy.

50 Ga. 272, Prescott vs. Bennett.
30 Ga. 191, (3) Lucas vs. Lucas, also page 206.
109 Ga. 359, Mize vs. Am. etc.

Undoubtedly he could have made this question in a motion for a new trial.

We insist that to have granted him a new trial on this ground, had the facts warranted the same, would have given him all the rights to which he would have been entitled.

We contend that after the term and after an adjudication on his case in the Supreme Court, he would not have been permitted to make this question, here presented, by habeas corpus.

79 Ga. 785, Daniels vs. Towers.
114 Ga. 66-7, Griffin vs. Eves.
126 Ga. 536 (1) McDonald.

Having sought and obtained an adjudication in that court he is precluded. The adjudication of the Supreme Court of Georgia, in other words, procured by Frank, now prevents any such proceeding.

79 Ga. 785, Daniels vs. Towers.
114 Ga. 65, Griffin vs. Eaves.

All matters which could have and properly should have been incorporated in a motion for a new trial are presumed to have been,

138 Ga. 740, Leathers vs. Leathers.
116 Ga. 596, Regopoulos.

Here the same case which was brought to this court on "motion in arrest," which was denied, again appears in the shape of "a motion to set aside," and the court in the first headnote said:

> "In obedience to rulings heretofore made, it is held that a motion to set aside a judgment, like a motion to arrest it, must be predicated on some defact, apparent on the face of the record. The two differ only in respect of the time at which each must be made."

The second headnote says:

> "*It follows from the foregoing that a motion to* set aside a judgment in a criminal case upon the ground that the accused had, upon demand for a list of the witnesses upon whose testimony the charge against him was founded, been furnished with an incorrect list, was properly overruled."

This case cites several decisions and is undoubtedly the law, affirming previous decisions, and the principle involved in this case never having been disturbed or questioned, except in a headnote decision in the 126th Ga., page 536, McDonald; the second headnote of which we confess our inability to harmonize and reconcile with the Regopoulos, in the 116th Ga., as we understand it.

But we cite the first headnote in

126 Ga. 536, McDonald,

as an authority consistent with the contention of the State in this case, because while the court in this headnote 1, refers to a judgment, it clearly shows that what they were considering, and what was being dealt with to set aside, was a *verdict*.

Some of the decisions in line with the Regopoulos, in both the 115th and the 116th Ga., which recognize those decisions and decide the law in conformity therewith, rendered since that decision, are as follows:

121 Ga. 40, Leffler & Son vs. Union Compress Co.

This case was twice before this court, the second time in 122 Ga., page 640. These two decisions, in our opinion, make the distinction clear. In 121 Ga. 40, the court rules in the first headnote as follows:

> "A motion in arrest of judgment must be predicated upon some defect, not amendable, which appears on the face of the Record."

Now in 122 Ga. 640, Union Compress Co. vs. Leffler & Son, an amendment, probably not objected to, was filed. See headnote 7, and on page 641, under the statement of the case the following, "On the return of the remittitur and before it was entered in the court below, the garnishee offered a written amendment wherein it alleged that the judgment in the garnishment case was void because the record therein disclosed—" etc., but note in the opinion by Judge Lamar this language, namely: "Judgments of every court of record may for good cause be opened, vacated or amended during the term."

These two cases establish, in our opinion, the two propositions for which we contend in this case, namely: that judgments, as is decided in the second headnote of the 122d Ga. 640, can be arrested during the term or set aside on motion after the term only for defects appearing on the face of the Record, but as stated by Judge Lamar, the court may

open, vacate, or amend, etc., *during the term*. In other words, these decisions show that the courts always make a distinction between motions made *during the term* and those not made until after the term, and they make a distinction between motions under 5957, based on the Record, and motions made under 5965, which refers to motions predicated on matters dehors the Record, and which said motions under section 5965, while they need not necessarily always be made during the term are nevertheless when made governed and controlled by principles to which we will hereinafter refer and which do not obtain in the instant case.

117 Ga. 501, Tietjan vs. Merchants National Bank.

The first headnote says: "A motion to set aside a judgment must be based upon some defect apparent upon the face of the record."

A similar case is 3 Ga. A., 178 and 184, Drought et al. vs. Pooge:

120 Ga. 578, Ayer vs. James.

The first headnote here is identical with the Regopoulos, and please see the second headnote, which is an authority for the proposition contended for by us, viz: that no matter what you may designate the motion, the court decides for itself, from the motion, what it really is.

We particularly invite the Court's consideration of the opinion by Justice Evans.

We also desire the court to note in this decision on page 582, that it appeared that "later on, on the same day, within an hour after the verdict was returned, James went to consult other counsel who *immediately prepared and presented* to the court the motion hereinbefore set forth," and Justice Evans says, to use his language: "The trial judge might well in the exercise of the *wide discretion* with which he is vested, have passed an order reinstating the case for a trial on its merits."

In other words, the motion to vacate the verdict must clearly have been made during the term, when the court was possessed of a power over both judgments and verdicts rendered, of which power the closing of the term would divest him.

1 Ga. App. 673, Georgia Railway & Electric Co. vs. Hamer; (the citations in headnotes in 1 and 2).
139 Ga. 597 (1), Moore vs. Moore & Cochran.

Of course the power of the court in the term as to judgments is to be differentiated from the court's power with reference to verdicts.

This proposition, that judgments are "in the breast of the court" during the term, is applicable alike to criminal as well as civil practice. See:

28 Ga. 235, Jobe.
53 Ga. 54, Este vs. Ivey (page 2 of opinion).
124 Ga. 912, Philips vs. Philips.
141 Ga. 799 (1), Tate vs. Little.
109 Ga. 798 (2), Moore vs. Kelley.
127 Ga. 24, Rawlins vs. Mitchell.

This case not only sustains the Regopoulos case, but stresses the fact that the motion referred to was presented at a *term subsequent* to the term at which the judgment was rendered, and after an *affirmance by the Supreme Court of Georgia* of a judgment overruling a motion for a new trial. In reference to this Rawlins case the court's attention is called to the fact that there was a verdict of guilty.

124 Ga. 31, Rawlins.

In

129 Ga. 292, Ford vs. Clark,

will be found another case. This is a case brought under section 5965, the equity section, of the Code. In the first

headnote stress seems to be put on the time at which the motion was brought, because of this language used, namely:

> "*The motion being made at the term of the court at which the verdict and judgment were entered,* and the movant showing that he was not in laches."

Judge Evans, in this case, recognizes the principle in the Regopoulos cases, but holds that for fraud, etc., a motion may be made predicated on facts dehors the record.

Our idea of the law is, that under section 5965, motions, under proper allegations as to the facts, and especially as to diligence, etc., might be brought after the term, but we do believe that it is essential, no matter what kind of a case it is, that *diligence* should always be made manifest.

See the opinion of the Court on page 295, paragraph 2.

On page 292 occurs the following statement, namely:

> "During the same term the defendant filed his motion to vacate and set aside *the verdict and judgment,*—" etc.

hence, here again, is a case where the court uses the word "judgment" embracing, as we contend, the word "verdict" also, though it will appear that the motion made referred to both the *verdict and the judgment.*

See also

119 Ga. 177, Williams vs. O'Neal, et al.

Here the Regopoulos case and others referred to by us are cited and approved.

See also the headnote under decision in

119 Ga. 615, Sweat vs. Latimer.

In

139 Ga. 597, Moore vs. Moore & Cochran,

is to be found another decision where a verdict and judg-

ment obtained by fraud, etc., were, where the movant was shown to have been diligent, set aside. Here, it will be noted, the motion referred to verdict and judgment both. This case followed after cases like Ford vs. Clark, 129 Ga. 292.

See also

139 Ga. 81, Worthy vs. Farmers Life Confederation.

We could cite other decisions since the 116 Ga., Regopoulos, but do not think that it is necessary to do so.

We did not discuss or refer to decisions prior to the Regopoulos cases, and which were cited in these decisions; but we now desire to refer to one or two cases prior to that decision.

108 Ga. 572, Longman et al. vs. Braidford.

This decision is referred to on page 592, 116 Ga., Regopoulos, where the court says that the point as to the remedy pursued does not appear to have been made, but if made this case must yield to rulings made in earlier decisions, which are cited.

From the headnote, however, it appears that the court in the case in 108 Ga. 572, considered the question as to *when* the proceedings were made. He pointed out that they must be "timely."

In

92 Ga. 440, Clark's Cove Guano Co. vs. Steed,

a verdict was involved and the motion was predicated on aliunde grounds.

In

109 Ga. 359, Mize v. Americus Mfg. & Improvement Co.,

the court holds that a motion to set aside a judgment on

the ground that one of the jury by whom the *verdict* upon which the judgment was rendered was returned, was disqualified, could not be sustained, but that the remedy in such a case was to make in due time a proper motion for a new trial.

In connection with this discussion, we will refer the court to

53 Ga. 136, Nolan, and to the same case in
55 Ga. 521.

There is nothing, as we understand these decisions, which should conflict with the position of the State, but on the other hand the State insists that on more than one question in this case these decisions are authorities for the State. In the first place they recognize the right of waiver on the part of the counsel and the defendant. That matter, however, is to be considered hereinafter.

The question presented in the Nolan case in the 53d Ga., as we understand the same, was simply as to whether or not the questions involved can be presented by a motion in arrest of judgment. The court held that it could not be made by motion in arrest. This decision was rendered in 1874.

The only proposition which the court was called upon to pass on in that case was whether or not a motion in arrest of judgment was the proper remedy, and the court said that it was not and sustained the lower court in refusing to release the defendant. Now Judge Warner, in the third headnote of this decision, went further than was necessary to a decision thereon and threw out the suggestion that the matters involved, being a fact extrinsic to the record, might be gone into on a motion to set aside the verdict.

In the first place, this was obiter. In the second place, if it be good law it must necessarily mean that Judge Warner contemplated such a motion *timely made during the term*, in a case where there was no ratification, acquiescence, waiver or estoppel.

Now the case again appears in the 55th Ga. 522. Presumably the lower court, acting on Judge Warner's obiter in the third paragraph of the decision in the 53d Ga. 139, went ahead and set aside on motion the verdict, and it is probable that no objection whatsoever was made thereto. Had there been objection, we submit that the court because such a motion to set aside was certainly made *beyond the term* at which the verdict of guilty was rendered, would have refused to set the same aside. But if that is not true, certainly the court would not have set aside the verdict had Nolan, *by a motion for a new trial not making this point,* made in these two decisions, treated the verdict of guilty as otherwise regular, legal and binding.

The decision in the 53d Ga., was undoubtedly technically correct. In this day and time, however, under the decisions in the Ford case, 129 Ga., and previous decisions referred to, the Georgia court probably without much reference to the technical designation of the motion would go to the merits of the controversy and treat the technical motion to arrest as a common-law motion to vacate or set aside in the nature of a new trial, *if it had been made during the term,* and would grant, probably, had there been no waiver or ratification, etc., the relief sought.

But, be that as it may, the decision in the 53d Ga. was right. The matter of law decided, and the law as laid down in the 55th Ga. is not now involved in any phase of this case, but the court's attention is called to the fact that both of these cases constitute strong authorities for the position of the State in this case on the question of counsel and client waiving their rights.

The Nolan case in the 55th Ga. 521, merely decided that on the second trial of the case, where the verdict had been set aside by the court and rendered null and void, the defendant could not be put in jeopardy a second time.

This, and this alone, was all, as we understand the case, that was decided. It seems to us to follow as a natural sequence and a logical conclusion that if the court had really

adjudicated that the verdict should be set aside, then the plea of former jeopardy should have been, as it was, sustained.

The Fannin case, 54 Ga. 476, while probably overruled in

128 Ga. 463, Franklin County vs. Crow (citations)

and not adopted as to other matters, (116 Ga. 597, Regopoulos), yet contains, in the opinion of Judge McCay, on pages 478, 479 and 480, expressions compatible with the State's position here presented.

In passing we will also call the court's attention to the fact that the last paragraph of the headnote shows that the court in dealing with the motion presented in this case, considered the doctrine of *estoppel and waiver and applied it.*

A decision by the Court of Appeals is to be considered, viz.:

7 Ga. App. 50, Lyon vs. State.

It is very apparent that Judge Hill, by whom Frank's motion on this petition was heard, and who rendered the opinion for the court in the Lyon case, did not, when he wrote the second headnote of the decision, have in mind the decision of this court in.

119 Ga. 396, Cawthon.

This is a strong case. The opinion written by Judge Cobb sustains the State's contention as to the right on the part of the defendant or his counsel to waive certain matters.

It will be noted that in the first headnote of this opinion the court said:

"The defendant in no manner waived either his own right to be present in person or his right to have his counsel present when the verdict was rendered."

However, we are not now citing this case on that phase of this Frank motion.

We cite 7 Ga. App. 50, Lyon, as an illustration with reference to the method of procedure adopted which we are now considering. Judge Hill, in the course of his opinion on page 52, says that this petition *was filed at the term at which the verdict was rendered.*

Judge Hill further, in paragraph 1, on page 52, differentiates this case from the Regopoulos, 116 Ga. 596, and puts it under Ford vs. Clark, 129 Ga. 292. Our idea is that Judge Hill rendered the right decision with reference to the matter considered in the Lyon case, but gave the wrong reason therefor. The Regopoulos case was not controlling. The reason it was not controlling was because the matters dealt with in the Lyons case were brought to the attention of the court *at the term at which the verdict was rendered.* The decision of the Court of Appeals in this case, we submit, should have been in principle put upon the broad proposition that the *motion was made at and during the term, and that the motion was in the nature of a motion for a new trial.* It should never have been put under the case of Ford vs. Clark, 129 Ga. 292, and other kindred cases, because those are cases where the right of action was predicated on the section of the Code hereinbefore referred to, which permits the court, where fraud, etc., has been shown, to set aside verdicts, *after the term.*

In the Regopoulos case in the 115 Ga. 232, it will be noted that the accused moved to rule out certain testimony, asked for the direction of a verdict of acquittal, and asked for a discharge, which motions were refused, and that he did not at any time ask to have a mistrial declared. In the 115 Ga., Regopoulos, the defendant, having failed to timely move for a mistrial, *waived that right.* It will be noted in this case in the 115 Ga., that Regopoulos had also made a motion for a new trial, which was overruled, and which was expressly abandoned, and hence this conduct constituted a waiver. And, therefore, when the Regopoulos case in the 115th Ga. got up to the court it was one involving,

just exactly like this Frank case did, a technical question, pure and simple. And remember that the Regopoulos case in the 116 Ga. came up on a motion made *after the term and after* all these matters referred to in the 115 Ga., Regopoulos, had transpired.

Hence we say that the Court of Appeals, in the Lyon case, in the 7th Ga. App., did right to differentiate that case from the Regopoulos case, but fell into error in trying to analogize the matter presented to the other cases referred to in the opinion. Our position is that it should have been dealt with by the court as a motion *made during the term,* and to use the language of Judge Hill, as "a petition to vacate and set aside a verdict."

We think also that Judge Hill was wrong when he used the following *obiter* on page 53, viz.:

> "We know of no other full and adequate remedy for a party deprived of his right as alleged in this petition than the one adopted. . . . The error is hardly one that would be properly made in a motion for a new trial," etc.

This question was not involved or necessary for a decision of the Lyons case.

In 13 Ga. App. 440, Miller, a similar matter was dealt with in *a motion for a new trial.*

In 13 Ga. App. 135, Bentford vs. Shiver,

will be found several expressions, both in the headnote and in the body of the decision, which support our contention. See headnote 2, page 136. In the body of this headnote this language is used, viz.:

> "A judgment which depends entirely upon the fact that the court erred in refusing a continuance, may, upon a proper showing, be set aside for this irregularity, just as a judgment obtained by fraud or by perjury may be set aside upon a *timely* and