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Costello

Argued by
OSMOND K. FRAENKEL,
SAMUEL S. LEIBOWITZ.

Supreme Court

OF THE STATE OF ALABAMA.

STATE OF ALABAMA,
Respondent,
against
HAYWOOD PATTERSON,
Appellant.

STATE OF ALABAMA,
Respondent,
against
CLARENCE NORRIS,
Appellant.

BRIEF FOR APPELLANTS.

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These are two of what have come to be known as the Scottsboro cases. Both defendants have been convicted of rape and sentenced to death. Defendant Patterson has been tried three times, defendant Norris twice. Appeals from the first trials of the two came before this Court in 224 Ala. 524 and 531 (see also 224 Ala. 540). These judgments of conviction, which were affirmed by this Court, were subsequently reversed by the

Supreme Court of the United States on the ground that the defendants had not had adequate representation by counsel (287 U. S. 45). Thereafter a change of venue was had from Jackson County to Morgan County and a trial held of the defendant Patterson alone, before Judge Horton and a jury in April, 1933. The verdict of the jury in that case Judge Horton subsequently set aside on the ground that it was contrary to the weight of evidence. The third trial of Patterson was then had before Judge Callahan and a jury in November, 1933. It resulted in the conviction from which one of the present appeals is being taken. Norris' second trial immediately followed this third trial of Patterson.

Both appeals are being argued in a single brief because so many of the legal questions which arose at the two trials are the same. In particular is this true of three motions which were made in advance of the trials proper and which in both cases rested on the identical records—one to quash the indictments, one for a change of venue and a third to quash the venire.

The basis of the first motion was that the defendant had been denied the equal protection of the laws guaranteed him by the Fourteenth Amendment of the United States Constitution because, in the selection of the jury roll from which were drawn the grand jurors who found the indictments, discrimination had been exercised against him as a Negro. Defendant asserted in his petition that there were in Jackson County at the time of the preparation of this jury roll many Negroes qualified for jury service, that no Negroes had ever been called for such service or had served as jurors and that the reason why they had been excluded was the fact of their race

(Patterson transcript, pp. 48, 49). To the denial of the motion to quash the indictments due exception was taken (Patterson transcript, p. 167). The nature of the testimony and the arguments based upon it will be more fully discussed hereafter. By stipulation in the Norris case all this testimony was made available to that defendant (Norris transcript, p. 44).

The motion for change of venue was supported by voluminous affidavits which claimed the existence in Morgan County of a state of feeling inimical to the defense and its counsel such that no fair trial could be had there (Patterson transcript, pp. 168 and following). On the hearing of this motion testimony was taken and affidavits filed on behalf of the State. The questions arising on this motion also will hereafter be discussed. To the Court's denial of the motion exception was duly taken (Patterson transcript, p. 418) and by stipulation this record also was made available to the defendant Norris (Norris transcript, p. 44).

The third motion, that to quash the venire, rested on the ground that there were Negroes in Morgan County qualified to serve as jurors but that none had ever been called for jury service or had served, and that the exclusion was due to their race and was in violation of the Fourteenth Amendment of the United States Constitution (Patterson transcript, pp. 419-424). After the denial by the State of the allegations of the motion it was stipulated that the testimony taken before Judge Horton on a similar motion be offered in evidence and the same was read (Patterson transcript, p. 429). Judge Horton had ruled that a prima facie case of discrimination had been established by the defense and had put on the

State the burden of showing that none had existed. The State attempted to meet this burden and Judge Callahan denied the motion, to which denial an exception was duly reserved by the defendant Patterson (Patterson transcript, p. 497). By stipulation this motion and the rulings made were made available to the defendant Norris (Norris transcript, p. 44).

In both cases exceptions were reserved to certain rulings of the Court in connection with the examination of the jurors. Exceptions were also reserved to numerous rulings throughout the trials relating to the introduction and exclusion of evidence, to remarks made by the Court to counsel during the course of the trial, and, in certain instances, to remarks made in summation by the prosecuting officer and to the Court's charge and refusal to charge.

In both cases motions were filed for new trials which were stricken by the Court on motion by the State which claimed they were filed too late. Exception was taken to this ruling (Patterson transcript, p. 784; Norris transcript, p. 25). All these exceptions are presented to the consideration of this Court. For their proper understanding it will be necessary to discuss in some detail the testimony produced at the trials. This evidence is in numerous vital particulars entirely different from that which appeared in the records before this Court on the first appeals.

The Evidence.

The contention of the State was that these two defendants, together with seven other Negro boys, had raped two white girls on a freight train while it was passing from Stevenson to Paint Rock. On

the same freight train there had been five white boys, two of whom, Lester Carter and Orville Gilley, were witnesses at these trials. At the trials at Scottsboro both these girls, Victoria Price and Ruby Bates, had testified for the prosecution. At the trials now under review only Victoria Price so testified. Ruby Bates had at the trial before Judge Horton appeared as a witness for the defense. At the trials now under review she did not testify in person as she was ill in New York (Patterson transcript, p. 724), where her deposition was taken. This was used in the Norris case (Norris transcript, p. 585) but not in the Patterson case because in the latter instance the Court refused to grant an overnight adjournment in order to await its arrival (Patterson transcript, p. 766). This refusal constitutes one of the exceptions which will be argued hereafter. At the present trials, therefore, as will be developed in detail, Victoria Price asserted that there had been raping, Ruby Bates asserted that there had been none.

Victoria Price testified that she and Ruby Bates had on March 24, 1931 left their home in Huntsville, traveling together alone on a freight train bound for Chattanooga (Patterson transcript, pp. 513, 514). She denied that she had left Huntsville in company with Lester Carter (Patterson transcript, p. 513). At one trial she admitted having known him in Huntsville by sight (Patterson transcript, p. 518); at the other that she had never seen him before in her life (Norris transcript, p. 521). Carter testified that he had known both these girls for some months before the freight ride, had been very friendly with them and had left Huntsville with both of them in accordance with a pre-arranged plan to which Jack Tiller was a party (Patterson transcript, pp. 662,

665, 666; Norris transcript, pp. 607, 608). According to Victoria Price's own story Tiller was her "boy friend" (Patterson transcript, p. 513; Norris transcript, p. 524). Ruby Bates corroborated Carter's statement regarding the ride from Huntsville that it was a pre-arranged affair (Norris transcript, pp. 587, 588). It should be noted that most of her answers were excluded by the Court which fact appellants claim, and will hereafter argue, constitutes prejudicial error.

Carter testified that when the freight train arrived in Chattanooga toward evening of March 24th he met Orville Gilley, while he was with the two girls (Patterson transcript, p. 667; Norris transcript, p. 608). All attempts to find out what thereafter occurred during the course of that night and where the girls and Carter spent those hours were frustrated by rulings of the Court which rulings will again herein form the basis of subsequent discussion. Carter did testify that he and Gilley had been together the entire night and that they had been separated from the girls for only a few minutes at a time (Patterson transcript, p. 668). Gilley corroborated meeting Carter with the girls along the railroad tracks outside Chattanooga (Patterson transcript, pp. 596, 597). Ruby Bates testified to the same effect although much of her testimony was not permitted to go before the jury (Norris transcript, pp. 589-591).

As appears from the records of the Scottsboro trials on file in this Court Victoria Price had there testified that she and Ruby Bates had spent the night in question in Chattanooga with an acquaintance of theirs by the name of Callie Brochie at the latter's home on Seventh Street (Weems and Norris transcript, pp. 18-19; Patterson transcript,

pp. 19-20). At the trial before Judge Horton she testified to the same effect (see current Patterson transcript, pp. 769-770). At that trial it was established that no such person as Callie Brochie resided in Chattanooga (Patterson transcript, pp. 776-777). This discovery constituted one of the facts Judge Horton relied on in his refusal to credit Victoria Price (see Patterson transcript, p. 753). As will be hereafter developed more fully, at each of the trials under review all questions directed to the ascertainment of how Victoria Price spent the night before the alleged rape were excluded by the Court and exceptions were duly taken (see Patterson transcript, pp. 516-518).

Regardless of the particular way in which they spent that night it is clear that these two girls and these two boys formed a group. Gilley testified to buying food for the girls in the evening (Patterson transcript, p. 599) and begging it in the morning (Patterson transcript, pp. 597, 599). According to the testimony of Carter, of Gilley and of Ruby Bates, all four of them boarded a freight train bound back to Huntsville on the morning of March 25th (Patterson transcript, pp. 601, 669; Norris transcript, pp. 578, 591, 609). Victoria Price, on the other hand, persistently denied that on the trip back from Chattanooga to Huntsville either Carter or Gilley accompanied herself and Ruby Bates (Patterson transcript, p. 518; Norris transcript, p. 523).

The freight train which was travelling west from Chattanooga consisted of 43 cars, inclusive of engine and caboose. Its exact make-up was testified to by Turner, the conductor on the day in question, and is of some importance in the understanding of what occurred on the train and at Paint Rock, where the arrests were made. Part of the present brief consists of a diagram of this

train and the station area at Paint Rock. The items in the description which should be borne in mind as being important are first, that there were certain empty box cars near the end of the train (Patterson transcript, p. 613; Norris transcript, p. 397), and second, that near the front of the train there was a string of eight gondola cars to the rear of which were also some box cars. The first of these gondolas was the eighth car behind the engine (Patterson transcript, p. 613; Norris transcript, p. 561). These gondolas were loaded with chert, or the ground stone used on the road bed of the railroad (Patterson transcript, p. 614). The chert filled the gondolas up to about 1½ or 2 feet of its top (Patterson transcript, p. 509; Norris transcript, p. 514).

On this moving freight train there were, in addition to the two girls and their two companions, at least five other white boys and a number of Negro boys. Carter testified that after the train left the tunnel at Look-out Mountain coming out of Chattanooga a fight started between some Negro boys and some white boys (Patterson transcript, p. 671; Norris transcript, p. 609) and that one of the white boys asked him to lend a hand if further trouble should develop (Patterson transcript, p. 671).

At Stevenson the train stopped for the purpose of taking on another freight car (Patterson transcript, p. 613). Victoria Price testified that when it halted there she and Ruby Bates got out of the oil car on which they had been riding and went by themselves into a gondola car (Patterson transcript, p. 509). Gilley, Carter and Ruby Bates stated that at Stevenson the group of four changed to the gondola (Patterson transcript, pp. 592, 670; Norris transcript, pp. 609, 578, 592).

The testimony is in conflict whether the other white boys got into the gondola in which these two girls, Carter and Gilley were traveling. Victoria Price claims that all the white boys entered this gondola after she and Ruby Bates had got in and that the girls paid no attention whatever to them, stating of these boys: "they had their feet towards us laying down on their stomachs, with their heads towards the engine" (Patterson transcript, p. 509; Norris transcript, p. 518). Gilley who, as already noted, contradicted the prosecutrix in her claim that she was not traveling with any of the white boys, also contradicted her in his description of how they were placed in the car. He said that the boys faced the girls (Norris transcript, p. 579). He did, however, assert that the other white boys were in the same gondola (Patterson transcript, p. 593; Norris transcript, p. 578), whereas Carter and Ruby Bates both testified that the original group of four remained alone in one of the gondolas and that the other white boys were in a different car (Patterson transcript, p. 671; Norris transcript, pp. 610, 592).

Carter testified further that shortly after the train left Stevenson a fight started between these other white boys and some of the Negroes somewhere on the train, and that the white boys came from the rear of the train into the gondola next to the one in which he was riding with Gilley and the girls and asked that he and Gilley help them in the threatened fight (Patterson transcript, p. 671). Ruby Bates testified that some talk took place between the white boys and Carter, following which Negroes came into the gondola to the rear of them and a fight began (Norris transcript, p. 592). Carter started to cross over from the one gondola to the other to join in the scrimmage

but instead jumped off the train when he saw that the Negroes were outnumbering the whites (Patterson transcript, pp. 671, 676; Norris transcript, pp. 610, 614). With four other white boys he then walked back to Stevenson from which place the group was taken to Scottsboro (Patterson transcript, p. 672; Norris transcript, pp. 610, 616).

A number of people along the right of way of the road saw the fight going on on the train. Lee Adams, a farmer, who was sitting on a load of cross ties on a wagon about a mile west of Stevenson when the freight train passed him (Patterson transcript, p. 582; Norris transcript, p. 547) testified to having observed some scuffling. He did not see any women (Patterson transcript, p. 584). All he remembered was that two people were thrown off the train and that, as he reached the railroad track, he saw those people going back towards Stevenson with blood on their faces. He did not speak to them (Patterson transcript, p. 583; Norris transcript, pp. 547, 548).

Luther Morris, another farmer, testified that he lived a mile and a half west of Stevenson and that he saw this freight train through a window in the loft of his barn. He claimed to have observed seven or eight Negroes and five or six white boys and to have seen the Negroes put the white boys off. He also saw two girls in the car (Patterson transcript, p. 571; Norris transcript, p. 618). At the Patterson trial he stated at first: "They were in the bottom or close to the bottom, I could only see their heads" (Patterson transcript, p. 571). Later, however, he asserted: "they were standing up fixing to get off" and denied he had said they were in the bottom of the car (Patterson transcript, p. 577). At the Norris

trial he testified: "I seen something going on very serious. * * * When I saw somebody put hands on these girls I quit watching. Then I seen them throw off two or three white boys" (Norris transcript, p. 618). According to his recollection the girls were dressed in overalls but not in coats (Patterson transcript, p. 577; Norris transcript, p. 620) nor did he notice any hats (Patterson transcript, p. 580). He was able to give no reason for knowing they were women. He said he had seen the Negroes take hold of the girls after they tried to get off and that "the negroes grabbed them and snaked them to the bottom of the car" (Patterson transcript, p. 580). He added further that he had heard screams and cries (Patterson transcript, p. 581; Norris transcript, p. 619). He made no effort, he testified, to reach a telephone after what he had observed nor to advise anyone that two women were being attacked (Patterson transcript, p. 582; Norris transcript, p. 620). "I just stayed home and said nothing" was his statement at the last of the trials.

This train was also observed about half a mile beyond the place where Morris had seen it by Tom Dobbins, a farmer, and his employee, Sam Mitchell. Dobbins testified that he saw a lot of people in the gondola, scuffling around. It looked to him like fighting going on between white and colored people but he saw no one get off the train (Patterson transcript, p. 585; Norris transcript, p. 558). He was unable to state whether there were women abroad (Norris transcript, p. 558). He remembered seeing some Negroes standing in a box car near the caboose while the fighting was in progress near the front of the train (Norris transcript, p. 559). Sam Mitchell, his Negro employee, who was with him, also testified to a fight

between white and colored people and said there were Negroes in the doorways of box cars further down the train (Patterson transcript, pp. 585, 586; Norris transcript, p. 560). He said the people who were wrestling were all men (Norris transcript, p. 560). No other testimony was given by any of the farmers along the way although at some of the trials there had been testimony by other people, particularly by Ory Dobbins, the son of Tom. His father testified that he could have appeared as a witness if he had been subpoenaed (Patterson transcript, p. 585).

Two of the white boys remained on the train. John Gleason, one of the group of five white boys, was not thrown off during the fight but remained somewhere on the train all the way to Paint Rock (Patterson transcript, pp. 608, 609; Norris transcript, p. 581). Orville Gilley, who had accompanied the two girls in the ride from Chattanooga, remained on the train with them. Gilley saw Gleason at Paint Rock and was taken with him to Scottsboro in the same truck with the Negroes (Patterson transcript, p. 609; Norris transcript, p. 582). Whether or not he took part in the fight, as also whether or not he attempted to get off the train, remains in dispute. Carter testified that he did not see what Gilley did (Patterson transcript, p. 671; Norris transcript, p. 610). Ruby Bates said that Gilley started to get off "but was pulled back in the car by one of the negro boys" (Norris transcript, p. 592). Victoria Price gave similar testimony (Norris transcript, p. 535). At the first trial Gilley said he had never left the car (Patterson transcript, p. 608) but at the second he said they had at first tried to push him off (Norris transcript, p. 582). It is undisputed, however, that he remained on the train until it reached Paint Rock.

This fight between the Negroes and the white boys had its origin, according to Carter, in difficulties which began shortly after the train left Chattanooga and which, arising through a white boy's stepping on a Negro boy's hand, continued at intervals, accompanied by the throwing of stones, until the train reached Stevenson (Patterson transcript, pp. 670, 677, 678; Norris transcript, p. 609). The defendant, Patterson, himself testified about this. He said the boys swore at each other (Patterson transcript, p. 620) and that later on some of the white boys threw stones back at the Negroes and aroused their anger, so a number of Negro boys decided they would go forward to settle with the white boys (Patterson transcript, pp. 621, 622).

The defendant was travelling in company with Eugene Williams, Andy Wright and Roy Wright (Patterson transcript, p. 620). He knew none of the other Negroes on the train (Patterson transcript, pp. 622, 626, 627). Andy Wright, the elder of the two Wright boys, corroborated him in these particulars (Patterson transcript, pp. 657-660). Wright stated that Norris and Weems were in the fight but that Powell, Montgomery and Roberson were not (Patterson transcript, p. 660). Powell himself testified that he had been riding between two cars when he saw the fight and that he did not join in (Patterson transcript, p. 652). Montgomery testified that he was blind in one eye and that the other eye was very weak; that he had boarded the train at Chattanooga, got on an oil car and remained there until he was taken off it at Paint Rock. He said he knew nothing about any fighting whatsoever (Patterson transcript, p. 655). Roberson, who was painfully sick with both syphilis and gonorrhea, testified that he was

in an empty box car all the way from Stevenson to Paint Rock and that he too knew nothing whatever about the fight (Patterson transcript, pp. 649, 650).

Defendant Patterson and Andy Wright both insisted that this fight took place in the fourth gondola from the caboose (Patterson transcript, pp. 622, 658). Patterson testified that while the fight was in progress two white boys came from the gondola in front of the one in which the fight occurred. Later he learned that these were Gilley and Carter (Patterson transcript, p. 622). He said he had not looked into the car from which they came and had not at any time seen women anywhere on the train (Patterson transcript, p. 623). Andy Wright also testified that two white boys came over from the next forward gondola; and he too denied having seen girls in that car or on the train at all (Patterson transcript, pp. 657, 658). Powell testified that he had been riding between a box car and a gondola, that the fight went on four gondolas away from him and that he had seen no women on the train (Patterson transcript, p. 652). That this fight occurred in one of the middle gondolas was Carter's testimony (Patterson transcript, p. 671; Norris transcript, p. 609). Ruby Bates swore to the same effect (Norris transcript, p. 592). Gilley was in doubt about the location of the gondola. He picked it out from a model train which the defense had produced in the courtroom as being one of the two gondolas nearest the engine (Patterson transcript, p. 605). After he left the witness stand and conferred with counsel for the prosecution (Patterson transcript, p. 610) he changed his testimony, stating he had been "turned around as to the place where the engine was" (Patterson

transcript, p. 611). He admitted, nevertheless, that he had seen the place of the engine on the model before he picked the gondola out (Patterson transcript, p. 612). Victoria Price alone of all these witnesses insisted that she and the others had travelled in the gondola next the box car near the end of the train (Patterson transcript, pp. 509, 522; Norris transcript, p. 534). She described in detail dramatic in its effect how the Negro boys jumped over her head as they filed into the gondola from the adjoining box car (Patterson transcript, p. 509; Norris transcript, p. 514). This story Gilley did not confirm, although he claimed he was facing the girls and should by that token have been in a position to see the dramatic entrance, had it occurred (Norris transcript, p. 579).

The question of the gondola in which the girls were riding is of considerable importance as an indication of the untrustworthiness of the prosecutrix's testimony. As will be shown hereafter, numerous witnesses saw these two girls at Paint Rock in a position with reference to the train and the station area such that it was impossible for them to have been riding on the last of the gondolas. Moreover the conductor of the freight train, Turner, found a snuff box in one of the middle gondolas (Patterson transcript, p. 614; Norris transcript, p. 562). That Victoria Price had a snuff box was sworn to by Carter (Patterson transcript, p. 683; Norris transcript, p. 610). Indeed Gilley testified that he had given her such a box in Chattanooga (Patterson transcript, p. 605). She herself, while admitting that she had snuff in her mouth on this occasion (Patterson transcript, p. 526; Norris transcript, p. 524) was evasive on the subject of the box itself (Patter-

son transcript, p. 525; Norris transcript, p. 524).

In further amplification of her dramatic version of the fight Victoria Price testified that when the Negroes came over into the gondola they fired a shot (Patterson transcript, p. 509). Later she stated it was two or three shots and that the defendant, Patterson, had fired one of the guns himself (Patterson transcript, p. 527). She gave no similar testimony at the Norris trial, perhaps because Gilley denied having heard any shots (Patterson transcript, p. 609) and none were testified to by any of the farmers along the railroad whom the prosecution called as witnesses. One of these was, Adams, who definitely stated that he had heard no shots (Patterson transcript, p. 584). Mrs. Price testified that the Negroes had two pistols (Patterson transcript, p. 526) and that a number of them had knives (Patterson transcript, pp. 511, 533; Norris transcript, p. 515). At the Scottsboro trials she had on three separate occasions testified as to the calibre of the pistols she had seen (Patterson transcript, pp. 718, 719). She claimed at the trials now under discussion that she knew nothing about guns (Patterson transcript, p. 526; Norris transcript, pp. 527-528), her explanation of her earlier testimony being simply: "I heard them called that" (Norris transcript, p. 528).

No pistols were found on any of the defendants when they were arrested and the only knife produced was, according to the prosecution, not one of theirs but one which Victoria Price claimed as her own. She testified at the first trial that Patterson had taken it from her (Patterson transcript, p. 510); at the second, that one of the Negroes had done so and that she had next seen it in the courtroom at Scottsboro in the possession of Mr. Woodall (Norris transcript, p. 536). At the Patterson trial there was no attempt to account for the production of the knife and no evidence to show that it had been found in the possession of either the defendant or any of the other Negroes. At the Norris trial, however, Woodall testified that he and Deputy Sheriff Simmons had searched the Negroes after they were arrested and that he had found on the defendant, Norris, the knife he identified as the same which had been produced in Court (Norris transcript, p. 553). While Woodall claimed that after the arrest Norris had said he had taken the knife from one of the white girls (Norris transcript, p. 553), Simmons stated that Norris had told Woodall it was his own knife (Norris transcript, p. 557). In any case, no attempt was made to account for the absence of the pistols and the other knives which Victoria Price claimed had been in the Negroes' possession. The claim of the prosecution must be, therefore, that those Negroes who had knives of their own threw them away, took a knife from the prosecutrix and kept that one, although it was the one object which, if found in their possession, would incriminate them. In connection with Simmons' statement that Norris claimed the knife as his own there should be considered the testimony of Carter, that he saw no knife in Victoria Price's possession but that, on the contrary, she had asked him in Chattanooga for the use of his, in order to open a milk can (Norris transcript, p. 610).

Mrs. Price testified that the fight between the white boys and the Negroes lasted about five or ten minutes (Patterson transcript, p. 528; Norris transcript, p. 525). At the first trial she claimed she had been eager to get out of the car as quickly

as possible and had put one leg over the side of the gondola (Patterson transcript, p. 529) but had been prevented from jumping off because Negroes were running up and down the side of the car and two or three of them were standing at each corner (Patterson transcript, p. 532). Neither Gilley nor Carter witnessed any occurrences such as these described by the prosecutrix nor had she ever told this particular story at any previous trial. And at the Norris trial, after first claiming she had been prevented from jumping out by the Negroes (Norris transcript, p. 515), she finally admitted that during the entire duration of the fight she had stood, "interested in watching the fight"; that there had been nothing to stop her from getting out of the gondola and that she had done nothing at all at the time (Norris transcript, p. 525). She abandoned the story she had told at the Patterson trial that she had been prevented from getting out because Negroes had been standing in the corners of the car.

She claimed that twelve Negroes came over into the gondola although she stated she did not count them as they came (Patterson transcript, p. 526; Norris transcript, pp. 525, 526). She said she saw three of these get off the train later (Norris transcript, p. 525) and she testified that six of the Negroes had intercourse with her (Patterson transcript, p. 511) and that the others had intercourse with Ruby Bates (Patterson transcript, p. 511). It was, of course, her contention that all the Negroes arrested had taken part in the raping. Indeed at one of the Scottsboro trials she attempted picking out the order in which they had made the attacks (Weems transcript, pp. 26, 27). At another trial she included among those who had raped her the blind Montgomery (Powell

transcript, p. 23). It was also there contended that all the arrested Negroes had had intercourse either with Victoria Price or with Ruby Bates.

At the last Patterson trial Mrs. Price testified as she had done at Scottsboro (see Powell transcript, p. 21), that "Haywood Patterson, while the others were having sexual intercourse with me, had a gun and kept going around the side to keep the white boys off * * *" (Patterson transcript, p. 511). No one corroborated this highly dramatic story which was obviously impossible in view of the fact that the train was moving at about 35 miles an hour (Patterson transcript, p. 526). Moreover, had it been true, some of the white boys would have been witnesses to the raping. None of them had testified at Scottsboro although they were all there at the time, kept in jail while the trials were being held. At the Norris trial Mrs. Price seems to have realized the extravagance of this bit of testimony because she there denied it (Norris transcript, p. 530).

She stated that the six Negroes raped her very quickly, one after the other (Patterson transcript, p. 544). At the Scottsboro trials, and also before Judge Horton, her testimony had been that each of the six had raped her only once (Patterson transcript, p. 716). At the last Patterson trial she refused to be definite on this subject and became evasive in her answers to questions directed toward finding out about how much time the raping had taken (Patterson transcript, p. 544). She was vague about how long it went on, also about her previous testimony on the subject (Patterson transcript, pp. 545, 546). Before Judge Horton, however, she had testified that these acts had ended about five minutes before the train reached Paint Rock (Patterson transcript, p. 716). She

gave somewhat similar testimony at the Norris trial (Norris transcript, p. 533).

While the raping was supposed to be going on Mrs. Price wore a pair of step-ins, three dresses, a shirt-waist, a pair of over-alls, a girl's coat and a hat (Patterson transcript, p. 510; Norris transcript, p. 516). The "shirt-waist" which she said she wore under the dresses and the over-alls was a blue shirt, a man's shirt (Patterson transcript, p. 515). She also wore a coat with a fur collar (Norris transcript, p. 525). She claimed the Negroes threw her down on the chert (Patterson transcript, pp. 510, 536; Norris transcript, p. 516) and said they pulled off her pants and jerked her belt loose and then tore her step-ins apart (Patterson transcript, p. 510). She asserted she had been hit on the face by practically all twelve Negroes (Patterson transcript, pp. 533, 534). And she testified that she had resisted with all her force (Patterson transcript, pp. 536, 543). Mrs. Price characterized the Negroes as heavy and rough (Norris transcript, p. 526). One of them had at all times her head pressed down with a knife at her throat, and another her legs spread apart (Patterson transcript, p. 511; Norris transcript, pp. 516, 530).

And at considerable length she gave testimony regarding the injuries she sustained as a result of the raping. There can be no doubt that, had any such occurrence as she described actually taken place, it would have been not only natural but inevitable that she suffer bruises and other injuries in different parts of the body. Not only did she claim that she did sustain such injuries, but that these marks were present when she was examined by a doctor at Paint Rock. Her testimony regarding her injuries differed somewhat at the two trials as it differed also from testimony

she had given at earlier trials, both in point of inclusion and of omission.

The prosecutrix stated that she was hit on the face with the butt end of a pistol and that this blow caused a little bleeding (Patterson transcript, p. 532; Norris transcript, p. 527); that one man hit her on the back with a pistol (Patterson transcript, pp. 533) and that "practically all" twelve Negroes hit her on the face (Patterson transcript, p. 534)—this although, at the Norris trial, she was unable to state how many had punched her in the face but did remark: "Sure, they punched me in the face; they knocked my head around" (Norris transcript, p. 528). She said: "My whole face was swollen up and bruised, black and blue kin'ly" (Norris transcript, p. 528).

In addition to a cut over her eye-brow she had a scratch, she stated, over her eye, marks on her throat, a swollen nose and bruised and swollen lips (Patterson transcript, pp. 550, 551; Norris transcript, p. 528). She said that the inside of her lips bled (Patterson transcript, p. 551; Norris transcript, p. 528). She claimed there were four or five scratches on her breasts and bruised spots all over her body, especially upon her stomach and her legs; also that her ankles were swollen (Patterson transcript, p. 551). And at the Norris trial she added a new note, namely, that the skin on her body had been torn in several places "on my throat and on my face * * * also on my back. I had one spot on my leg where it was skinned a little bit" (Norris transcript, p. 533). She also claimed that her stomach, hips and back were sore (Norris transcript, p. 533).

At the trial before Judge Horton she had testified that there had been blood on her back (Pat-

terson transcript, p. 717; Norris transcript, p. 529). At both the present trials she denied this (Patterson transcript, pp. 541, 546; Norris transcript, pp. 528, 529). She had also said before Judge Horton that her vagina had bled and that this blood had come out on her clothes (Patterson transcript, p. 716), whereas at the trial before Judge Callahan she testified otherwise (Patterson transcript, p. 546). However, at the Norris trial before Judge Callahan, after some fencing on the subject, she finally admitted that her vagina had bled: "I was kin'ly bloody, a little bit" (Norris transcript, p. 532). She here still denied her former claim that blood had come out on her clothes. At this last trial she described herself as having been "all sore from the manhandling and pummeling that I got. I was sore all over my body, kin'ly" (Norris transcript, p. 530), and asserted that the Negroes had not spared her in any way and had naturally hurt her face (Norris transcript, p. 530). Finally, she said that in the process of tearing her step-ins apart, a Negro scratched her in the crotch (Norris transcript, p. 537).

Gilley denied having seen anyone hit Mrs. Price (Patterson transcript, p. 606). And, although he noticed her face at Paint Rock and later at Scottsboro (Patterson transcript, p. 606), he did not in any way corroborate her as to the condition of her face. Other persons who had seen her at Paint Rock had noticed neither bruises nor blood (see Patterson transcript, pp. 565, 592).

At this point it will be useful to anticipate strict chronology to point out what was observed by the doctor when he examined Mrs. Price at Scottsboro some hours after she was taken off the train. In the jail at Scottsboro the two girls were exam-

ined by two physicians, Dr. Lynch, the local health officer, and Dr. Bridges, another local doctor of standing in his community. Only Dr. Bridges testified at this trial although Dr. Lynch had testified at one of the Scottsboro trials. On those occasions, as well as before Judge Horton, Dr. Bridges had testified for the prosecution (see for instance Powell transcript, p. 24). His testimony was substantially the same at all the trials. At the two here under review the State did not call him but the defense did. He testified that he had been called to the jail to examine Victoria Price on the afternoon of March 25, 1931, but that he had refused to examine her there and had her brought to his office, where he had examined her at about four o'clock in the afternoon. He denied having seen blood on her head, found cuts or marks on her cheek or blood coming out from her mouth or having discovered her lips swollen (Patterson transcript, pp. 642, 643; Norris transcript, p. 564). "If I had seen that, I would have noticed it. We were looking for those things" (Norris transcript, p. 564). "I was examining her for the purpose of finding marks, if possible, and I made note of everything I saw" (Norris transcript, p. 564). A little later he examined Victoria Price's whole body while she was naked and found no blood on her back and none coming from the vagina. He testified that her private parts were dry and all he noticed were some small scratches on her wrist and some small blue marks in the small of her back (Patterson transcript, p. 643); Norris transcript, p. 564). He said he found no lacerations of her vagina and no broken skin on her legs or back (Norris transcript, p. 564). The only bruise which he found was "a small blue spot about like a pecan in the small of the back" (Norris transcript, p. 566).

Dr. Bridges further testified that at the time he examined Victoria Price her respiration and pulse had both been normal (Patterson transcript, p. 647; Norris transcript, p. 564).

He had observed no semen on her (Patterson transcript, p. 643), although she testified that her body and her clothes were wet with such semen, stating specifically that the lining of her coat, her dresses and her step-ins had all shown stains (Patterson transcript, p. 547). She stated that she wore these garments when the doctor examined her and that the stains were still there, also that her legs were a little wet, wet enough, she said, for the doctor, "to tell it all right" (Patterson transcript, p. 550). At the Norris trial she at first refused to admit that her body had been wet by the Negroes but when pressed finally testified that the Negroes had wet her a little. "It wet me around my private parts, kin'ly * * * so that as each man got off me I was more and more wet" (Norris transcript, p. 531). She refused to admit that at the trial before Judge Horton she had testified that her coat had been spattered with semen and that it was noticeable while she was being examined by the doctors (Norris transcript, p. 538). Yet such had been her testimony, given without hestiation at the trial of Patterson just a few days earlier (Patterson transcript, p. 547). The only thing which the doctor noticed, he said, was a spot on her leg which was moist and the moisture covered with coal dust but he said he had not been able to tell whether this was semen or what it was (Patterson transcript, p. 647). No one testified to having noticed the semen stains which Mrs. Price described nor were the clothes themselves produced as evidence at any of the trials, except that

the step-ins were produced for the first time at the trial before Judge Horton and again at the last two trials. These step-ins as well as the dresses, however, Mrs. Price had washed in jail before the Scottsboro trials took place (Patterson transcript, p. 555; Norris transcript, p. 536); and her coat had been laundered at the instance of one of the deputies (Patterson transcript, p. 555). The washing of these garments had not taken place, however, until after the doctors had examined her (Norris transcript, p. 535).

There was no testimony by anyone that stains of semen had at any time been observed on the clothes of any of the Negroes.

This alleged raping continued, it appears, while the train travelled in broad day-light through populated country and passed a number of stations where people were standing to see it go by (Patterson transcript, p. 616). An hour and ten minutes were consumed in traversing the distance from Stevenson to Paint Rock (Patterson transcript, p. 614). The stations between the two places were Fackler, Hollywood, Scottsboro, Larkinsville, Limrock and Woodville, of which Hollywood, Scottsboro and Larkinsville were telegraph offices (Patterson transcript, p. 564). The day in question was a fair day (Patterson transcript, p. 564). The conductor of the train had heard of no trouble until he reached Paint Rock (Patterson transcript, p. 614; Norris transcript, p. 562). It would have been possible at any moment to have called the attention of the train crew by cutting the air between the cars or by using the hand-brake of which there was one on each car; and it was also possible for a man to go forward or back along the train (Patterson transcript, p. 619).

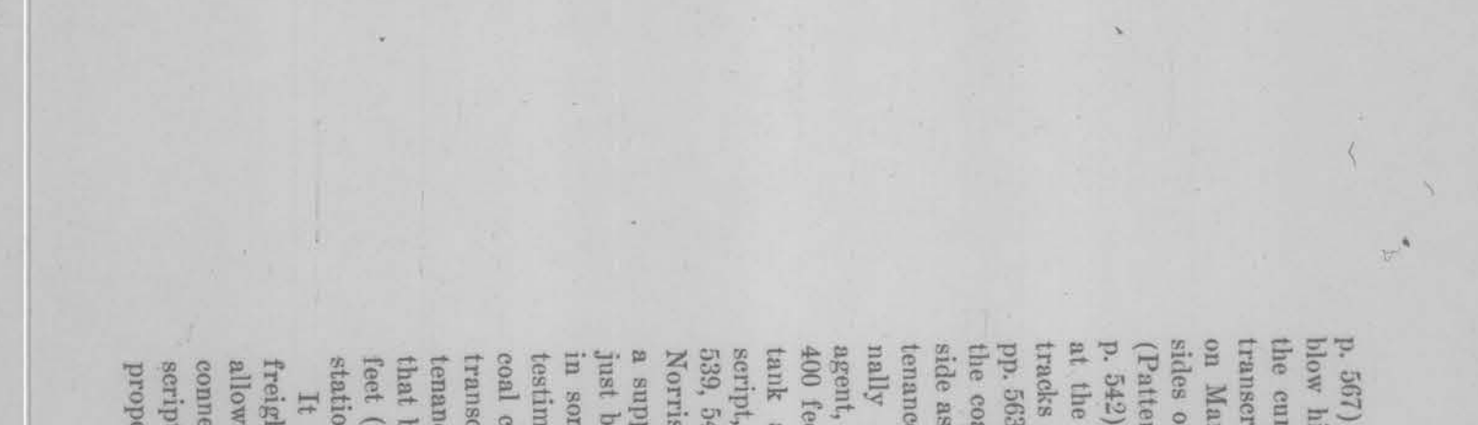
In spite of these facts no attempt was made by either Gilley or Gleason to notify anyone on the train that something was wrong. Gilley admitted that he made no attempt to go back to the caboose and communicate with the conductor (Patterson transcript, p. 608) or go forward to communicate with the engineer (Patterson transcript, p. 609). He made no claim that he was prevented from leaving the car. On the contrary, he stated that the Negroes had threatened to shoot him if he did not go out (Patterson transcript, p. 594) but said that, nevertheless, he had remained (Patterson transcript, p. 608). Mrs. Price testified that he had been prevented from seeking help while the raping was going on because "the colored boys was holding their knives on him" (Patterson transcript, p. 512) but Gilley gave no such testimony at the Patterson trial. And at the Norris trial, where Mrs. Price did not give this testimony, he contended for the first time that Patterson had held a pistol to him (Norris transcript, p. 569). However, he also said then that they had tried to push him off the car (Norris transcript, p. 569) and one tried to choke him but he finally added: "They tried for a little while to put me off and then decided to let me alone" (Norris transcript, p. 582). He stated also: "They told me to stay in this end of the gondola up there from where they were" (Norris transcript, p. 570). It is quite evident that Gilley was not molested by the Negroes. He was evasive when asked about the stations through which he had passed, refusing to admit having noticed any or even having been able to see over the side of the gondola car (Patterson transcript, p. 607; Norris transcript, p. 583).

Gilley claimed that he had been the cause of the raping's coming to an end about fifteen minutes before the train reached Paint Rock (Patterson transcript, p. 594). He had asked Patterson, the Negro with the gun, he said, to stop the raping as one of the girls was gasping, her eyes were bulging out, and they would kill her; and he asserted that Patterson had thereupon told the other Negroes to stop and threatened to put them off the train if they didn't (Patterson transcript, p. 594; Norris transcript, p. 571). Victoria Price told a quite different story, namely, that the attacks had ended about five minutes before the train reached Paint Rock (Patterson transcript, p. 716) and that when Gilley tried to help her on with her overalls Patterson had interfered (Patterson transcript, p. 548). She testified that the Negroes said: "they were going to take us north and make us their women" (Patterson transcript, p. 548). Gilley heard no talk to this effect (Patterson transcript, p. 594) and Mrs. Price failed to corroborate him as to either the conversation he had had with Patterson or regarding what he said Patterson had told the other Negroes. Mrs. Price added in the Norris case that when the raping was over she was lying with her head in Gilley's lap and Ruby Bates was sitting down "with one of the negroes with his arm around her neck" (Norris transcript, p. 533). Ruby Bates testified not only that there had been no raping but also that the Negroes had never come into the car in which she and Victoria Price were riding with Gilley (Norris transcript, pp. 592, 598).

The train reached Paint Rock at about two o'clock of that afternoon. The station was a regular stop for this freight (Patterson transcript,

p. 567) and it was customary for the engineer to blow his whistle and slow down coming around the curve (Patterson transcript, p. 563; Norris transcript, p. 542). As it approached the station on March 25, 1931, there were waiting on both sides of the track about fifty or sixty armed men (Patterson transcript, p. 566; Norris transcript, p. 542). When the train stopped the engine was at the coal chute which lies on the side of the tracks opposite the station (Patterson transcript, pp. 563, 564; Norris transcript, p. 542). Between the coal chute and the station, and on the same side as the station, were a water tank and a maintenance house (Norris transcript, p. 539). Originally all the witnesses, including the station agent, Hill, testified that the coal chute was about 400 feet from the railroad station and the water tank about midway between (Patterson transcript, pp. 563, 569, 589; Norris transcript, pp. 539, 540, 551). Just before the conclusion of the Norris case a witness was permitted to testify in a supposed rebuttal to measurements which had just been made by Hill. While the witness was in some respects confused, it appears from his testimony that the actual distance between the coal chute and the station was 804 feet (Norris transcript, p. 624), the distance between the maintenance house and the coal chute 680 feet and that between the station and the water tank 301 feet (Norris transcript, p. 624). The plan of the station area is based on these last measurements.

It was generally accepted that each of the freight cars was about forty feet long, that an allowance of three feet had to be made for the connections between the cars (Patterson transcript, p. 563; Norris transcript, p. 541). For a proper understanding of the description given by



1. Place where Victoria Price claims to have fallen off car.
2. Place where Hill saw girls get off car—being about midway between the maintenance house and the coal chute.
3. Place at which Rousseau saw Negroes get off after having climbed from a gondola on to a box car.
4. Position of Brannum when he saw girls on other side of tracks, he being on right hand of water tank.
5. Position of Ricks at tender.
6. Conductor found snuff box in one of these cars. In the first of these cars Carter testified he was travelling with the girls and Gilley. The fight took place in the gondola to the rear.

Each car 40 ft. + 3, 15 cars = 645 ft. from tender.

T—Tender.

B—Box car.

C—Coal car.

G—Gondola car.

the various witnesses of the events which took place when the train stopped at Paint Rock, it should be borne in mind that the first of the gondolas was the eighth car from the engine. After the tender there were two box cars, then a coal car, then four box cars including the one picked up at Stevenson (Patterson transcript, p. 613; Norris transcript, p. 561). The first of these gondolas was, therefore, 301 feet from the coal chute and the end of the last of them 645 feet away. As the coal chute was 804 feet from the station the end of this last gondola must have been 159 feet from the station. And as the water tank was 301 feet from the station the end of this gondola lay between the station and this tank and was 142 feet (or over three car lengths) before reaching the water tank.

Victoria Price testified that as the train reached Paint Rock she stepped out of the gondola in which she had been riding, the last of the string of gondolas near the caboose, and fell down and fainted (Patterson transcript, pp. 511, 549; Norris transcript, p. 517). Before that occurrence she had stood up in the car and seen all the Negroes running up toward the engine (Patterson transcript, pp. 511, 549). She said that Gilley left the car as soon as the train stopped, that Ruby Bates got off and that finally she herself did (Patterson transcript, p. 549; Norris transcript, p. 534). She denied trying to run from the place where she had stepped off and claimed that she fell from the stirrup of the gondola to the ground (Patterson transcript, p. 549). Gilley himself admitted that as soon as the train reached Paint Rock he got right out, saw no one else get off, and did not again see the girls until they were up at a store (Patterson transcript, p. 595; Norris transcript, p. 576).

As Victoria Price got off the train she was observed on the ground by a number of witnesses. It is obvious from the diagram that had she been in the last of the gondolas she would have got off on the station side of the maintenance house and nearly 150 feet before the water tank. Actually she was observed by all the witnesses at a point beyond the water tank and in the direction of the coal chute. Hill, the station master at Paint Rock, testified that as the train came to a stop he left the station and went toward the front end of the train until he was about even with the water tank (Patterson transcript, p. 564). He said that when he arrived at that point the two girls had just come off the train and that he saw them on the ground, Ruby Bates supporting Victoria Price (Patterson transcript, p. 560; Norris transcript, p. 538). He was sure both girls were standing when he first saw them (Patterson transcript, p. 565; Norris transcript, p. 538). At the Norris trial he testified that the car at the side of which he saw the women standing was "about midway between this house (referring to the maintenance house) and the coal chute"; and said they were nearer the water tank than the coal chute (Norris transcript, p. 540). At the Patterson trial he said that he saw them next to a car out of which he had seen some Negroes climb, which he thought was six or eight cars from the engine (Patterson transcript, pp. 560, 564). A glance at the diagram will show that the eighth car (which was the first of the gondolas) was about midway between the maintenance house and the coal chute and somewhat nearer the water tank than it was the coal chute. That place has been marked on the diagram, therefore, as indicating where the station master first saw the girls.

Of the posse of fifty or more men present on this occasion only two testified at these trials. Tom Taylor Rousseau testified that he was on the same side of the tracks as the station but that he did not see the women until they had left the station (Patterson transcript, p. 568; Norris transcript, p. 545). He did, however, notice some Negroes get off a car (Patterson transcript, p. 568) and attempting to crawl on to the box car ahead, toward the engine (Norris transcript, p. 545). The witness stood, he said, between the water tank and the coal chute and was looking toward the engine. All he saw was that three or four Negroes got off on the side he was on. "That's all I know anything about" (Patterson transcript, p. 569). He also testified that after the train stopped he ran toward the coal chute "because this crowd was trying to get off" (Patterson transcript, p. 569). At the Norris trial he attempted to testify that all nine of the defendants came out of this car, that seven got off on the side he was on and two on the other side (Norris transcript, p. 545). He was finally forced to admit that he had participated in the removal of only one of them (Norris transcript, p. 546). In any case, Rousseau's testimony fixed the place at which some Negroes came off the train at about that fixed by Hill and the others, the place where Hill first saw the girls on the ground, namely, near the gondola just behind a box car.

The third member of the posse, W. E. Brannum, was on the side of the tracks opposite the station and stood at first a little to the south of the station, that is, in the direction of Stevenson (Patterson transcript, p. 589; Norris transcript, p. 548). He said he had observed the train when it was some distance from the station and had

noticed about 15 or 16 Negroes in a car about six or eight back from the engine climbing out of a gondola car (Patterson transcript, p. 586). As the train pulled up they were climbing, he said, into a coal car and had already passed the station and reached a point about even with the water tank (Patterson transcript, p. 591). He said he had run along the tracks as the train passed towards the water tank. "I got to where the water tank is and I went a little further on down between the water tank and the coal chute. * * * It was about 150 feet from the coal chute, I guess" (Patterson transcript, p. 589). At the Norris trial, however, he claimed first that he had got to a point about half-way between the water tank and the maintenance house (Norris transcript, p. 550) and then, on a number of other occasions at that trial, that he was to the right of the water tank as he faced it (Norris transcript, pp. 551, 552). When he finally stopped he had reached a point, he testified, at which the Negroes were captured and he saw a lady who "sank down to the ground" (Patterson transcript, p. 587; Norris transcript, p. 548). Whatever he observed he saw through the space between two cars (Patterson transcript, p. 591; Norris transcript, p. 548). He too, therefore, places these women on the ground at a point very near that at which they were seen by Hill and at which the Negroes were observed by Rousseau.

It is, therefore, clear that Negroes got off the train somewhere near the seventh or eighth car on the train. Mrs. Price, it will be remembered, had testified that the Negroes ran forward from the car in which the alleged raping took place, the last gondola, or the fifteenth car, of the train. Nevertheless, all the witnesses testified that she

was first seen on the ground at a point where the Negroes also got off the frain, therefore, about seven car lengths from where she claimed she got off. This could have happened only if she had run along the ground some distance from the place where she first got off the car; and such was the testimony of the fireman of that train, Ricks. In pursuance of his duties he got up on the top of the tender, he said, when the train reached Paint Rock from which place he was able to look down the train (Patterson transcript, p. 615; Norris transcript, p. 542). He saw two women get off a gondola about in the middle of the string of gondolas. "It seemed like they was excited", he said, "and started back toward the engine, and there was a posse of men coming around the engine meeting them, about that time another group of people come up and they was surrounded" (Patterson transcript, p. 615). At the second trial he testified: "When they got off they started toward the engine. They started hurriedly. I would say they started to run. Now, as they were running towards the engine, they were finally stopped by a crowd of men that surrounded them" (Norris transcript, p. 543). He also testified that only one of the colored men came up toward the engine and that the others were arrested further back, and that he saw some of them in a box car (Patterson transcript, p. 616; Norris transcript, pp. 542, 543).

It has already been pointed out both that Carter and Ruby Bates, and, to some extent Gilley, contradict the claim of Victoria Price that she was travelling in the last of the gondola cars, and that the conductor found a snuff box in one of the middle of these cars. If, as the defense claims, the girls were travelling in the fourth of the gondolas from the front, namely, the eleventh car, then it is perfectly possible that, descending from that car, they might have run, as Ricks said they did, and had been stopped by the posse at about the same point where some of the Negroes had got off, namely, near the seventh or eighth car. In no other way is it possible to reconcile the testimony of these witnesses. Certainly the story told by the prosecutrix that she got off the end of the fifteenth car and immediately fell to the ground is utterly destroyed by the testimony of the other witnesses for the prosecution.

All these events cast the gravest doubt on the possibility that any raping at all went on on this train. The action of the girls in running forward as though seeking to escape and that of Gilley in leaving girls supposed just to have been raped is so inconsistent with their subsequent stories that the whole case of the prosecution becomes discredited. Furthermore, there is no evidence that any complaint was made at Paint Rock that there had been raping. Hill testified that he saw a white boy (who must have been Gilley) run off from the train near where the girls were, and later saw two white boys in town (Norris transcript, p. 540). He said both boys spoke to him then but never mentioned anything having happened to the girls (Norris transcript, p. 540). Gilley himself made no claim that he had said anything, although he admitted having spoken to the members of the posse and admitted that he made no attempt to find out how the girls were at Paint Rock (Norris transcript, p. 577). Rousseau testified that neither girl had made any complaint to him upon his seeing them first (Patterson transcript, p. 568). It is true that Hill, in answer to an objectionable leading question (to

which exception was duly taken), answered affirmatively to the words put into his mouth by the prosecutor, that he had heard one of the women make complaint "as to their treatment on the train" (Patterson transcript, p. 561). No attempt was made to find out what the basis of the complaint was nor how it had come to be made. No attempt was made to prove by any of the numerous other persons who must have seen these two girls and talked to them at Paint Rock that either had made such a complaint. In the Patterson case the Court, in its charge to the jury, referred to this statement of Hill's as evidence that the girls "had been attacked" (Patterson transcript, p. 738). The statement constitutes, of course, an unjustified extension of the evidence.

At Scottsboro the doctors examined the two girls both in the afternoon immediately after the raping and also during the following morning (Patterson transcript, p. 642; Norris transcript, p. 564). Victoria Price had testified before Judge Horton that when she was first examined she was crying. But at these trials she said she did not remember having given that testimony (Patterson transcript, p. 553). She said she was nervous when examined but would not say she was excited (Norris transcript, p. 535). At the Patterson trial she gave the impression that she had washed her head before going to the doctor's (Patterson transcript, pp. 552) but at the Norris trial she stated she had not done so (Norris transcript, p. 535). As has already been noted, she described in some detail the condition of her face and body as she claimed they were when the doctor examined her. The doctor found no such conditions. She claimed he had found the injured portions of her body by himself, except that she

had told him her hips were hurt (Patterson transcript, p. 553) and that he had turned her over and looked at her back, legs and stomach and there seen the bruises (Norris transcript, p. 535).

The doctor, however, testified that he had found only a few scratches and one or two small blue spots (Patterson transcript, p. 643; Norris transcript, pp. 397, 398). He said her pulse and respiration had both been normal (Patterson transcript, p. 647; Norris transcript, p. 564) and remarked: "When a person, especially a woman, is excited and under great nervous strain, the breathing is very fast as a rule" (Patterson transcript, p. 647). "A person under excitement, as a rule, especially a woman, would show a rapid pulse and rapid breathing" (Norris transcript, p. 564). He stated also that it was impossible that he might have overlooked lacerations of the skin such as Victoria Price had testified to (Norris transcript, p. 568). On the day following the first examination, after she had spent the night in jail, she was hysterical, he said (Norris transcript, p. 567). He stated that it was sometimes true a woman could be normal after going through excitement and be nervous the following day (Norris transcript, p. 567). But the only injuries that he remembered finding were "some scratches on the wrist and forearm and a blue place on the small of the back" (Norris transcript, p. 568).

There can be no doubt of the accuracy of the doctor's testimony. He examined these girls for the purpose of noting their condition. He was a local doctor who had for twenty years lived in the community and had at all the previous trials of these cases testified for the prosecution, even at the trial of last Spring before Judge Horton.

While the defense was not allowed to establish the fact on the record it was evident that he was in court under subpoena from the prosecution. Had there been any evidence on Victoria Price's body of injuries such as she claimed she sustained Dr. Bridges would have found them and would have testified concerning them. His failure to find such injuries, coupled with Victoria Price's readiness to change her story, sometimes denying what she had previously claimed, sometimes adding new elements, casts the greatest doubt upon her story. It may be that by now she herself believes it and therefore testifies to things which, if her story were indeed true, would have happened. But it is an incredible story.

Dr. Bridges did find semen on the walls of the canal in Mrs. Price's vagina (Patterson transcript, p. 644). The spermatozoa he found in the semen did not move, an indication, in his opinion, that they were dead (Patterson transcript, p. 645). He expressed the belief that the intercourse which produced the semen was recent but he was unable to say how long before his examination it had taken place, whether within one or two days or not (Patterson transcript, p. 648). No questions at all about semen were asked him at the Norris trial. In order to explain the presence of semen in Victoria Price's body the defense offered testimony to show that she had had intercourse either the night preceding the freight train ride or the night before that. The problems raised by the exclusion of this evidence will be discussed more fully hereafter in this argument.

Victoria Price was taken to jail at Scottsboro and kept there pending all the Scottsboro trials (Patterson transcript, pp. 551, 554). Carter and Gilley and the other white boys who had been on

the train also remained in the Scottsboro jail until after those trials were over (Patterson transcript, pp. 609, 673; Norris transcript, pp. 580, 611). At those Scottsboro trials not one of the white boys gave any testimony at all with the exception of Gilley and he testified at only one trial, in rebuttal. He said nothing whatever on that occasion about any raping (see old Powell transcript, p. 41). He did not testify before Judge Horton. Claiming that he had come back to Huntsvills about August 7th or 8th, 1933, from the State of California in order to find out when the next trial was going to be held (Patterson transcript, pp. 603, 604), he said there had been no correspondence between himself and Victoria Price during his absence and that he had received no message from Mr. Knight to come back (Patterson transcript, p. 604).

Gilley's story was that he had gone to visit Victoria Price's home "to see how she was getting along and how her mother was getting along" (Patterson transcript, p. 610). At the Norris trial he testified that he had been to see the girl for the first time on about June 1st (Norris transcript, p. 581) and that he had never visited her or her mother before or indeed known the mother at all before this first visit (Norris transcript, pp. 573, 576). He denied that he had ever talked to Victoria Price about the case (Patterson transcript, p. 610), although he admitted that he had been with her and Attorney General Knight, the three of them together, on one occasion in Huntsville. His story about this visit is very confused. At the Patterson trial he testified that he had seen Mr. Knight before he saw Victoria Price (Patterson transcript, p. 603) and that the meeting of the three together took place in the office of Mr.

Douglas Taylor and was the result of an appointment (Patterson transcript, p. 610). At the Norris trial he claimed that he had first seen Mrs. Price in June (Norris transcript, p. 581). He insisted he did not know why she was at the August meeting with Mr. Knight and that he said nothing about the case while they were together (Norris transcript, p. 576).

Mrs. Price herself was very evasive on this subject. She said at first that she had seen Gilley and Mr. Knight together, then denied that this had been in Huntsville, then said it had occurred in the Tennessee Valley Bank building, and finally, that the meeting had taken place at the courthouse (Patterson transcript, pp. 557, 558). She would not admit that any appointment had been made for her to meet Gilley, she said she had gone with someone but did not remember who it was and repeatedly asserted that no one had told her either to go or that she would find either Mr. Knight or Gilley there; and she was unable to remember what was talked about at that meeting (Patterson transcript, p. 558). At the Norris trial she was not questioned on the subject.

After the trials at Scottsboro the white boys released from jail scattered. Nothing has been heard of any of them except Carter and Gilley. Some time before the trial in Decatur these two met each other in California (Norris transcript, p. 612). Carter testified that Gilley told him there had been no raping but Gilley denied this (Norris transcript, pp. 611, 612). Gilley himself claims to have been wandering the country as a hobo entertainer, reciting poetry for pay in streets and hotel lobbies. But he could not give the name of a single hotel anywhere in the country in which he had recited (Patterson transcript,

p. 596; Norris transcript, p. 580). He offered no explanation whatever as to why he had not come back for the trial before Judge Horton.

Ruby Bates, who had testified at Scottsboro in corroboration of Victoria Price, had before Judge Horton last spring repudiated that testimony. In a deposition read in the Norris case she confirmed this repudiation. She said Victoria Price had told her she must tell the same story she was telling (Norris transcript, p. 595) and that unless she did so she might get Victoria Price into trouble and have her serve a jail sentence (Norris transcript, p. 596). Ruby Bates said she had been frightened because she had been threatened and that therefor she had at Scottsboro identified the defendants and testified against them (Norris transcript, p. 597). Subsequently, in January, 1932, Ruby Bates wrote a letter to a friend stating that the Scottsboro defendants were not guilty. On the following date, at the request of the Chief of Police, she signed an affidavit which she says she did not read, which stated that when she wrote that letter she was drunk. She explained this occurrence as follows: "I was terrorized by the Chief of Police of Madison County. That is why I signed this affidavit and I did not read the affidavit before I signed it" (Norris transcript, p. 606).

The deposition of Ruby Bates was not presented to the jury in the Patterson case. This was because the Court refused to permit an adjournment from 2:30 in the afternoon until the following morning to await the arrival of this deposition although advised by counsel that it had been taken, was in the mail and was expected to arrive the next morning (Patterson transcript, p. 724). It did in fact arrive on the morning after the tak-

ing of testimony was concluded and before the summations had been finished (Patterson transcript, p. 766). The refusal of the Court to permit this adjournment is relied upon as error and will be discussed hereafter, as will also its refusal to permit an adjournment in order to wait for the arrival of an important defense witness. When the taking of testimony was concluded at about 2:30 P. M. defendants' counsel advised the Court that the defense's medical expert, Dr. Reisman of Chattanooga, who had testified before Judge Horton, was actually on his way to Court by automobile, having been delayed in Chattanooga because he had had to perform an operation. The Court waited half an hour for his arrival and refused to wait any longer or to permit an adjournment until the following morning (Patterson transcript, pp. 728, 764). The physician actually arrived in Court shortly after the commencement of summations but the Court refused to permit these to be interrupted so that his testimony might be taken (Patterson transcript, p. 764). The Court had been apprised of the nature of Dr. Reisman's testimony which was similar to that which he had given before Judge Horton and concerned the semen found in Victoria Price's body (Patterson transcript, p. 763). Dr. Reisman was prepared to testify that this semen might have been the result of an intercourse consummated within two days prior to its being found, also that the finding in it of non-motile spermatozoa indicated that the intercourse had not taken place within a few hours before its discovery (Patterson transcript, pp. 763, 764).

Defendants contend that they did not have a fair trial at the hands of Judge Callahan. In support of this contention they will refer to

numerous remarks of this judge made during the trials, to his interruptions of counsel, to objections he volunteered and to other acts which must have had influence on the jury.

The legal propositions common to both these cases, some resting on identical records, others arising from exceptions taken to substantially identical rulings, will be first discussed. Thereafter defendants will develop separately the exceptions which have application to one or other of the trials only.

POINT I.

Defendants' rights under the Fourteenth Amendment of the United States Constitution have been violated by the exclusion of Negroes from the grand jury which indicted them.

The undisputed proof shows that no Negroes ever sat as jurors in Morgan County in which these indictments were found although there were many Negroes qualified to act as such jurors. No attempt was made by the State to justify this exclusion by any showing that consideration was given by the jury commissioners to Negro residents. It appeared, however, that on the jury rolls from which the grand jury was drawn were the names of six Negroes. The State evidently was content to rest upon this fact and the Court below denied the motion solely because of the presence of these names. Defendants contend that even if there were on these jury rolls the names of six Negroes discrimination was nevertheless practiced. But defendants submit that the uncontradicted expert testimony, as well as the books themselves, establish beyond possibility of contradiction that the names of the Negroes which

appeared on these books were not there when the grand jury was drawn. Defendants submit also that even if the facts do not establish the discrimination prohibited by the Constitution then they were deprived of an opportunity of adducing further proof to establish their contentions.

Defendants will argue first, the questions of discrimination itself, and next, the subject of the forged jury rolls. Preliminary to that question defendants will argue the power of this Court to review the determination of the Court below.

A. The Record Establishes Discrimination Against Negroes in the Selection of the Grand Jurors.

Regardless of the claim of the State that there were on the lists the names of six Negroes defendants submit that the record amply establishes discrimination in fact.

That no Negro had been known to sit on any jury in Jackson County was abundantly established. Mr. Benson, the editor of the Scottsboro Progressive Age, testified that he had followed court procedings in Jackson County regularly and had never known Negroes to serve (transcript, p. 91).* Mr. Stewart, one of the members of the jury board, testified that he had not known of a single instance in the county in which a Negro had sat on the jury (transcript, p. 111). Mr. Moody, a member of the subsequent jury board, testified to the same effect (transcript, p. 58). There was no attempt to dispute this contention and the Court below appears to have accepted the testimony as correct (transcript, p. 164). The Court went so far, in fact, as to recognize that on

*The pagination of both transcripts is identical on these motions.

the basis of this testimony there would be a presumption that Negroes had been improperly excluded.

Defendants proved that there resided in Jackson County Negroes duly qualified to serve as grand jurors. The fact was established by the testimony of numerous individuals. One of the witnesses, John Sanford, gave the names of a number of persons who, in his opinion, possessed the necessary qualifications for jury service (transcript, pp. 120, 121). Similar testimony was given by C. B. Finley (transcript, pp. 128, 129), and by Mark Taylor, one of those named by the others as qualified (transcript, pp. 133, 134). He himself testified as to his qualifications, stating that he was a qualified voter and had been appointed on the school board (transcript, p. 133). Travis Moseley, another of those named as qualified, testified as to the qualifications of others (transcript, p. 136). Similar testimony was given by L. C. Cole (transcript, pp. 137, 138), Pleas Larkin (transcript, p. 141), John Stapler (transcript, pp. 142, 143), Will Watkins (transcript, p. 145), and L. C. Stapler (transcript, pp. 146, 147).

Each of these witnesses testified that to his personal knowledge, knowledge which in most instances extended over a long period, no Negro had ever sat on a jury in Jackson County. The clerk of the old jury board, Morgan, testified to the same effect (transcript, p. 69) and so did the court reporter, Caldwell, who had attended every session of the Court for twenty-four years (transcript, p. 76).

No effort whatsoever was made by the prosecution to show that there had been no discrimination against Negroes. The State did not contend

on this motion, as it did on the motion to quash the venire, that Negroes were actually considered by the jury commissioners. It was not shown by what process there appeared on the books the names of those six Negroes already referred to, nor was it shown why these rather than others had been selected. There was no attempt by the State to show that any one of these Negroes was actually notified that he had been selected as a juror or that he was ever called for jury service. Under such circumstances it is submitted that the mere presence of six Negroes on a jury list comprising many thousands of names does not rebut the presumption of discrimination which arises from the proof that no Negroes had ever sat as jurors.

The Court itself made no attempt to pass on the question of discrimination, concluding merely that because there were Negroes' names on the jury roll the motion to quash should be overruled (transcrip, p. 167).

The Supreme Court of the United States has laid down certain principles applicable to this situation. In has held that the presumption of discrimination arises where it has been established that there are qualified Negroes in a community and for a period of years none have been called as jurors.

See *Strauder* v. *West Virginia,* 100 U. S. 303; *Virginia* v. *Rives,* 100 U. S. 313; *Neal* v. *Delaware,* 103 U. S. 370; *Gibson* v. *Mississippi,* 162 U. S. 565; *Carter* v. *Texas,* 177 U. S. 442; *Rogers* v. *Alabama,* 192 U. S. 226, and *Martin* v. *Texas,* 200 U. S. 316.

In the case at bar it is clear that there were qualified Negroes and that none had ever sat on juries. No explanation whatever of the failure

to select Negroes was offered. The language of Justice Harlan in *Neal* v. *Delaware,* supra, applies:

> "The showing thus made, including, as it did, the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned as a juror in the courts of the State —although its colored population exceeded twenty thousand in 1870, and in 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand— presented a prima facie case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the State Court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience or moral integrity, to sit on juries."

The Court's attention is also called to the recent decision in *Lee* v. *State,* 163 Md. 56. In that case the Court overruled the finding of the lower Court that there had been no discrimination in fact and held that the constitutional rights of the defendant had been violated, saying:

> "Only the white men appear to have been looked to for jurors. The evidence, with the long, unbroken absence of Negroes from the

> jury selected, seems to show an established practice, confining selections to white men as effectually as if such a restriction were prescribed by statute."

It is, therefore, submitted that whether or not the names of the six Negroes were properly on the jury rolls the presumption of discrimination arising from the failure ever to call a Negro has not been met by the State. And, of course, if, as defendants contend and will now argue, there were actually no Negroes on the jury roll at the time when the indictments were found the conclusion that discrimination was practiced is irresistible.

B. This Court and the Supreme Court of the United States Will Review the Determination of Fact by the Lower Court.

The contentions of the defense that the names of the Negroes were not upon the jury roll at the time the indictments were found are in no way contradicted. The only evidence submitted by the prosecution in any way bearing on the subject is the testimony of Morgan, the Clerk of the old jury board. Morgan was not asked the direct question whether he wrote the names of these Negroes prior to the finding of the indictments. There is merely the statement that he had written nothing in the book after the expiration of his term of office (transcript, p. 74). Defendants contend that this unsupported statement by the person charged with the fraud is entitled to no credence whatsoever and should be disregarded by this Court as it should have been by the Court below.

This Court has recently laid down the rule that where the controlling facts were established by undisputed evidence the decision of the Court below was not entitled to any presumption of correctness even though the evidence was heard orally and was, in part, conflicting. See *Duggan* v. *Duggan*, 227 Alabama 92 and *Henderson* v. *Henderson*, 153 Southern 646. In the case at bar it is quite clear that the controlling facts with regard to the writing of these books are undisputed and show that the conclusion of the Court below was erroneous.

However, it is submitted that even if Morgan's statement raises an apparent conflict of testimony, nevertheless under principles established by this Court the decision of the lower Court must be reviewed and will be set aside as palpably wrong and unjust.

The applicable rule was laid down by this Court in *Southern Railway Company* v. *Grady*, 192 Ala. 515. It was there stated:

> "Courts are organized that justice may be evenly administered, and if after allowing all reasonable presumptions in favor of the correctness of the verdict of the jury, the preponderance of the evidence against the verdict is so decided as to involve the conviction that it is wrong and unjust, then it is the duty of the Court to so exercise its powers and grant the new trial."

This Court has held that the same principle is applicable where the decison was rendered by the trial Court sitting without a jury. See *Byles* v. *State*, 205 Ala. 286. The Court's attention is called to the following cases in which it has applied the rule of the *Grady* case, reviewed the

facts, and found the decision of the lower Court so contrary to the weight of evidence as to require a reversal. Jury cases: *Cudd* v. *Bentley*, 204 Ala. 586; *Mutual Life Insurance Company* v. *Mandelbaum*, 207 Ala. 234; *American National Insurance Company* v. *Rosebrough*, 207 Ala. 538; *Louisville & Nashville Railroad* v. *Rush*, 208 Ala. 516; *Furst* v. *Shows*, 217 Ala. 297; *Carraway* v. *Graham*, 218 Ala. 453; *Mutual Life Insurance Company* v. *Maddox*, 223 Ala. 503; *National Life & Accident Company* v. *Spigener*, 225 Ala. 655; see also *Union Fire Insurance Company of Paris* v. *Ryals*, 25 Ala. App. 300. Non-jury cases: *Marsh* v. *Elba Bank & Trust Company*, 205 Ala. 425; *R. G. Lassiter & Company* v. *Nixon*, 218 Ala. 484; *Scott* v. *McGriff*, 222 Ala. 344; *Wright* v. *Price*, 226 Ala. 591; see also *First National Bank of Stevenson* v. *Crawford*, 25 Ala. App. 463.

The same rule applies to criminal cases. This was recognized by the statement of this Court in the earlier appeal in the *Patterson* case, 224 Ala. 531, and by the affirmance of the decision in *Bradley* v. *State*, 21 Ala. App. 539, affd. 215 Ala. 140. In the last case cited Judge Samford of the Court of Appeals said:

> "On the other hand, where the overwhelming evidence is against the verdict of the jury no sort of reasoning would justify an Appellate Court in refusing to take prompt action in setting aside the verdict."

Following the rule so laid down the Court of Appeals has reversed convictions in a number of cases. See *Vinson* v. *State*, 22 Ala. App. 112; *Mayes* v. *State*, 22 Ala. App. 316; *Skinner* v. *State*, 22 Ala. App. 457; *Hubbard* v. *State*, 23 Ala. App. 537; *Culbert* v. *State*, 23 Ala. App. 557. And in

McKenzie v. *State*, 25 Ala. App. 586, that Court reversed a conviction had before a Judge sitting without a jury on the ground that the decision was "repugnant to good conscience and fairness."

So in the case at bar the decision of the Court below must, it is submitted, be reviewed by this Court and found to be without substantial basis in the evidence.

The extent to which the facts will be reviewed by the Supreme Court of the United States in order to determine whether or not a constitutional right has been impaired, will be discussed more fully in connection with the motion to quash the trial venire.

C. *The Names of Negroes Appearing on the Jury Rolls Were Placed There After the Finding of the Indictments.*

When the jury rolls were produced before Judge Callahan the names of six Negroes appeared on them. These names appear immediately above red lines which were drawn on the books by a jury board which came into office after the indictments had been found. Except in the case of these six names and a few others the space above the red lines was on every page left blank. It is the contention of the defendants that these names of Negroes were written into spaces blank at the time the indictments were found and written in *after* the red lines had been drawn. The contention is supported by the undisputed fact that the writing of the names of the Negroes passed across and *over* the red lines, thus indicating that it was done after the red lines had been already drawn.

The jury roll consisted of two books in which each beat or precinct was separately listed. The

names of the jurors were alphabetically arranged with a separate page for each letter of the alphabet (transcript, p. 57). There were 39 precincts in Jackson County but, as there were probably no names under certain letters of the alphabet in some of the precincts, the number of pages was about 700 (see transcript, p. 166).

Mr. Moody, a member of the board which had been appointed in March, 1931 (transcript, p. 57), that is, after the preparation of the roll from which were drawn the grand jury which found the indictments, testified that the names from which that jury had been selected were all above certain red lines which had been drawn on each page (transcript, p. 57). About that fact there is no dispute.

This witness testified further that when he obtained possession of the books he instructed the clerk of the new board, Mr. J. D. Snodgrass, Jr., to draw two red lines under the names already appearing on the book (transcript, p. 63). He said he had seen Mr. Snodgrass do this when he first took office (transcript, p. 63) although he would not say he had seen every single line drawn (transcript, p. 66). And he was positive that every name that was written in thereafter came below the red lines (transcript, p. 63). He testified that as a general practice a line was left blank after the last name on each page on which the old board had written before these two red lines were drawn by the new board (transcript, pp. 64, 65).

Mr. Kelly Morgan, who had been the clerk of the old jury board (transcript, pp. 69, 70), testified that he entered all the names on the old roll in his own handwriting (transcript, pp. 70, 71). He said no one but himself had made any entries

until the new board came in (transcript, p. 71). He also testified that he had not put in any of the red lines in the book and that they were not there when he finished with it. "I don't know anything about the red lines at all" (transcript, p. 74).

The significant facts about this aspect of the case are two. Every name of a Negro found on the old jury roll was written in the one position: on the line immediately above the red lines, and therefore in the space by custom left blank. In each case, morever, the writing of these names was done *after* the red line had been already drawn in the book.

The names and precincts of the Negroes found on the jury roll follow:

Precinct No.		1	Mark Taylor	(p. 64);
"	"	3	Cam Rudder	(p. 65);
"	"	10	K. D. Snodgrass	(p. 60);
"	"	14	Pleas Larkin	(p. 67);
"	"	21	Travis Moseley	(p. 67);
"	"	21	Hugh Sanford	(p. 62).

Mr. J. V. Haring, whose qualifications as a handwriting expert are hardly open to question, covering as they do a wide range of professional activity for many public authorities and private persons (transcript, pp. 149-151), examined these entries. Using a microscope which magnified between ten and twenty fold (transcript, p. 152), he testified that in each case the ink used in writing the names of the Negroes was of a darker green than that which had been employed in writing the names immediately preceding these and that in each case some part of the names crossed the red lines and had been superimposed upon

these lines, certain proof that the writing had been done *after* the lines were ruled. The testimony regarding Taylor is to be found on pages 152 to 154, regarding Rudder, on pages 154 and 155; as to Snodgrass, on pages 155 and 156; as to Larkin, on page 157; as to Moseley, on pages 157 to 159, and as to Sanford, on page 159. In each instance the testimony was detailed and specific. In relation to Snodgrass the witness stated not only the foregoing circumstances but also that the formation of the letters here indicated that the writer of the name had tried to avoid the red line then already in existence (transcript, pp. 155, 156). The writing of the name Moseley, moreover, Mr. Haring stated, washed out some of the ink in the lines separating the date 3/20/31 which had been written in below the red lines (transcript, pp. 158, 159).

In the jury roll, also above the red lines which in most cases had been left blank were the names of a few white men. Mr. Haring said that in some of these cases the red line had been drawn *over* the writing of the names and in other cases the names were over the lines (transcript, pp. 157, 160).

No evidence was offered to refute any of this expert's findings nor was he in any way impeached. He was not even asked a single question in cross examination.

The Court below held, nevertheless, that the names of the jurors had been on the rolls at the time the indictments were found. In reaching this conclusion Judge Callahan advanced two arguments. One (transcript, p. 165) was that, because the names of some white men were found in the blank spaces above the red lines, no inference could be drawn from the fact that every

Negro's name was in like spaces above these red lines, elsewhere in the books left blank. The other argument stated (transcript, p. 166) that in one instance the date line was written over the red line and that as the clerk who drew the lines had not testified there was doubt as to when the red lines had been drawn. Before proceeding to analyze these arguments it may be remarked that the question was not whether the new date or the red lines had been put in first but whether the names of the Negroes had been placed there before the red lines.

The Court's first point has no force. If there was in fact a forgery, as contended by the defendants, it may well be that the forger added the names of a few white persons and placed these in the blank spaces in order to make his forgery appear the more plausible. Certainly the evidence both as to the difference in the colors of the ink used and as to the writing *over* the red lines remains unaffected by the circumstance that there were a few white names also on the blank lines. Moreover, the expert testified that the names of some of the white men had been written in *before* the red lines were drawn. It is far from inconceivable that in five out of seven hundred instances the clerk failed, when drawing the red lines, to leave a blank space.

The second argument of the Court disregards completely the positive and uncontradicted statement of the expert that the red lines were drawn *before* the writing of the Negroes' names, as well as the positive statement of the clerk of the old board that when he finished writing in the book there were no red lines upon it (transcript, p. 74). While it is true as noted by the Court that the President of the new board said he did not see every single red line drawn (transcript, p. 66), he

definitely testified that the red lines were all drawn at his instructions and *after* he took possession of the books (transcript, pp. 63, 64).

The uncontradicted testimony establishes, therefore, that the red lines were all drawn *after* the old jury roll was complete. It may be that in some instances the new clerk wrote in the date before, rather than after, he drew the red lines. There is no testimony as to the relative placing on the books of the red lines and the new dates, nor is this relation at all material, since it can throw no light on the question whether the red lines were on the books *before* the completion of the old jury roll.

It is not disputed that when the old jury roll was completed there were no red lines on the book. Consequently the testimony that the names of the Negroes were written *over* the red lines and, therefore, *after* they were drawn, is conclusive proof that these names were not on the jury roll at the time the grand jury was selected which found the indictments in these cases.

The Court below stated in its opinion that at the hearing before Judge Horton at least one witness, perhaps two, had testified that there were Negroes on the jury list (transcript, p. 164, see also comment on p. 162). It is respectfully submitted that this conclusion, although a possible one to draw from merely hearing the evidence read, was an incorrect one.

The testimony to which the Court referred was undoubtedly that of Commissioner Stewart. Mr. Stewart had testified that the jury roll was prepared from the tax books, the voting lists and the directories (transcript, pp. 109, 110). On these lists, which the witness sometimes also spoke of as "rolls" (transcript, p. 109), the names of Negroes of course appeared, because there were Negroes who voted and Negroes who paid taxes. It is submitted that a careful reading of all the testimony given by Stewart indicates that, in the answer to which the Court below presumably referred, Stewart was speaking of the preliminary lists and not the final jury roll. The testimony follows:

> "Q. Do you know of any negro, was there any negro on any list your commission prepared from which this Grand Jury was drawn, the name of any negro on that jury, yes or no?
>
> A. State the question.
>
> (Question read by the stenographer.)
>
> A. Yes, sir.
>
> Q. Was there any negro on the jury roll from which the Grand Jury was drawn?
>
> A. Negroes on the list.
>
> Q. What list?
>
> A. On the list these different parties we would call on.
>
> Q. I ask you if there was any negro on the jury list from which this Grand Jury was drawn?
>
> A. I don't remember.
>
> Q. Do you know of any?
>
> A. The names of negroes, the negroes' names are on the voting list.
>
> Q. I am not asking you about the voting list.
>
> A. On the jury roll?
>
> Q. Speaking of the jury roll?
>
> A. The Clerk copied the jury roll from the voting list.

Mr. Leibowitz: I move to strike that out.

(No ruling.)

Q. Of your knowledge do you know of any, as a member of the Jury Board, from which this jury was drawn, in the indictment of these negroes in these cases, do you know the name of any negro on that jury roll, were those names put in the box, do you know of anyone that was a negro, answer that yes or no?

A. I know of some negroes' names on there.

Q. Is that of your own knowledge?

A. Yes, sir.

Q. When you make up this jury roll, is the list you make up the names of the people that serve on juries?

A. We try to make a list of the male population" (transcript, pp. 109, 110).

Had Mr. Stewart intended in his affirmative answer to the first question to state that there were Negroes on the final jury roll, he would certainly have answered the second question with a simple affirmative. Instead of doing that, however, he stated that there were Negroes on the "list"—evidently, therefore, not on the final jury roll itself, since he then defines the "list" as that furnished by "these different parties." When thereupon asked the direct question about the jury roll itself, he answered first, that he did not remember and then, that there were Negroes on the "voting list." The additional answer, that the jury roll was copied from the voting list, throws no real light on the final jury roll, for the reason that that was the result of selection and not mere copying. The last part of the quoted testimony

shows that the witness was throughout confounding the preliminary lists with the final jury roll.

When this fact finally became clear Mr. Stewart was examined in more detail about the way in which the jurors' names were selected (transcript, pp. 110, 111). And when asked the direct question whether he knew the name of any Negro juror he answered that he did not (transcript, p. 111). At no time did he make the positive statement that the name of any Negro appeared on the jury roll itself. He admitted, however, that he had never examined a Negro for jury service (transcript, p. 115); and he could not state whether anyone else had ever done so or had ever gone to the trouble of investigating to find a qualified Negro (transcript, p. 115).

Mr. Morgan, the Clerk of the jury board for the year 1930, had also testified before Judge Horton that he could not state definitely whether there was any Negro on the jury roll. He said: "I couldn't swear * * * I couldn't recall * * * I wouldn't want to say" (transcript, pp. 116, 117). However, he refused to name any Negro as being on that roll (transcript, p. 117).

Moreover, the failure of the defense to obtain the production of the jury roll before Judge Horton and the attitude of the prosecutor at that hearing indicates strongly that the prosecution did not believe there were the names of Negroes on it.

At the hearing before Judge Horton defendants had tried and failed to have the jury roll produced in Court so as to establish that there were no Negroes on it. During Mr. Stewart's examination he was asked where the book was and he said he supposed it was in the custody of Judge Mooney of the Probate Court. Mr. Leibowitz remarked

that Judge Mooney had said he would send the book by someone (transcript, p. 111). He had not sent it with Stewart; nor did he send it by the clerk, Morgan (transcript, p. 116). And although the then President of the jury board, Mr. Moody, was present in Court (transcript, p. 100) he did not have the book in his possession, either. On the strength of Judge Mooney's promise Mr. Chamlee had excused him from appearing in Decatur (see Patterson transcript, p. 780). Later, when it became evident that the jury roll would not be voluntarily produced, Mr. Leibowitz asked to have it subpoenaed. Mr. Knight strenuously objected on the ground that its production in court would be immaterial even were all the names on it shown to be those of whites (see Patterson transcript, pp. 780, 781). He also claimed that the jury roll was to be kept secret by law (transcript, p. 113).

At no time in the course of the hearing before Judge Horton had Mr. Knight claimed that there was any testimony to show that there were Negroes on the roll. He had himself said he did not know whether the names of Negroes appeared on it or not (see Patterson transcript, p. 781).

It will be remembered that the names of Negroes actually found on the jury roll when it was produced in court included those of Mark Taylor (transcript, p. 64), Travis Moseley (transcript, p. 67), and Pleas Larkin (transcript, p. 67). At the hearing before Judge Horton Mr. Leibowitz had examined Mr. Moody, the President of the jury board, as to his knowledge of the qualifications of various Negroes claimed by the defense to be duly qualified (see transcript, pp. 107, 108). Mr. Moody admitted knowing Mark Taylor and said he was disqualified because he had lived in

adultery with his wife before marrying her (transcript, p. 107). He also admitted knowing Travis Moseley and Pleas Larkin (transcript p. 108). He made no claim that the names of any of these men were already on the jury roll; and he certainly would have known it had any of them been there.

That the prosecution did not believe they were on the jury roll seems a just inference from Mr. Knight's cross-examining the witness, J. Sanford, also. He made effort to discredit this witness's testimony that a number of Negroes, including Taylor and Moseley, were qualified (transcript, pp. 122, and following).

Enough has been said, it would seem, to indicate that Judge Callahan's statement (transcript, p. 162) that before Judge Horton there had been "positive testimony * * * that there were Negroes on the jury rolls" is mistaken and that the question as to whether there were Negroes on the rolls or not is one which must be determined from the evidence produced before the Court at the recent trial and the inferences to be drawn from the failure to produce the roll at the earlier one.

To sum up: the testimony of the expert, uncontradicted in any way and borne out by the records themselves, is to the effect that the red lines lie *under* the writing of the Negroes' names. The only possible inference, therefore, is that such writing was placed on the books after the ruling of the lines. And as the persons in charge of the books testified that the ruling did not take place until the new board had the books in its possession the conclusion becomes irresistible that the names of these six Negroes were not on the jury roll when the old board turned over the books in March, 1931.

Therefore, under decisions such as *Henderson* v. *Henderson*, supra, the decision of the Court below must be reversed, even though the testimony was heard orally.

It is difficult to use restraint in characterizing the tactics of the prosecution in these cases. Before Judge Horton every effort was made to keep these jury rolls out of evidence. Before Judge Callahan they were produced with an alacrity which under the circumstances seems no less than ominous. There can be no question but that the rolls were tampered with after the drawing of the red lines in 1931 and so after the finding of these indictments. The episode is a disgrace to all who had a part in this desperate attempt to defeat the provisions of the fundamental law of our land. And if an act such as this remains unrebuked by this Court that omission will become a blot on the fair name of the State of Alabama.

D. The Court Erred in Refusing to Give Defendants an Opportunity to Offer Further Proof of Discrimination.

Defendants contend that their constitutional rights were violated because the Court below deprived them of the opportunity of offering additional proof in contradiction of the State's contention that there were Negroes on the jury roll.

Defendants' counsel had required the appearance of Judge Hawkins, the Sheriff of Jackson County, and Judge Mooney, who had the jury rolls in custody, but they did not appear (transcript, p. 162). Mr. Leibowitz asked for an adjournment so that he might secure the attendance of these men as witnesses without subjecting them to the indignity of a body attachment; he was refused, and exception duly noted (transcript, pp. 162, 163).

Defendants' counsel desired an adjournment in order to permit the attendance of a number of persons prepared to prove that as far back as 1922 and from 1922 and thereafter, no names of Negroes had appeared on the rolls of Jackson County (transcript, p. 161). The Court below refused to grant the adjournment on the ground that counsel should have been prepared with this testimony in view of the testimony given before Judge Horton to the effect that at least one person had sworn there were Negroes on the jury roll and exception to this ruling was also noted (transcript, p. 162). The Court's attention has already been called to the fact that Judge Callahan misconstrued that testimony; and that there was no reason why defendants' counsel should have supposed the State would try to prove there actually were Negroes on the roll. Defendants were entitled, therefore, to a reasonable adjournment for the purpose of procuring the attendance of witnesses they required.

That defendants were entitled to a full opportunity to prove the facts alleged in their motion is well established.

The Supreme Court of the United States has reversed a conviction because, as in the case at bar, a defendant had been deprived of his right to establish the truth of allegations of discrimination regarding the selection of the grand jury which indicted him. In *Carter* v. *Texas*, 177 U. S. 442, Justice Gray reviewed the authorities and pointed out that it was not necessary for a defendant situated as described to state in his bill of exceptions either the names of prospective witnesses or what their testimony was going to be:

"Whenever by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all person of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder* v. *West Virginia*, 100 U. S. 303; 25 L. ed. 664; *Neal* v. *Delaware*, 103 U. S. 370, 397, 26 L. ed. 567, 574; *Gibson* v. *Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904." • • •

"The defendant having offered to introduce witnesses to prove the allegations in the motion to quash, and the court having declined to hear any evidence upon the subject, it is quite clear that the omission of the bill of exceptions to give the names of the witnesses whom the defendant proposed or intended to call, or to state their testimony in detail, cannot deprive the defendant of the benefit of his exception to the refusal of the court to hear any evidence whatever. And the assumption, in the final opinion of the state court, that no evidence was tendered by the defendant in support of the allegations in the motion to quash, is plainly disproved by the statements, in the bill of exceptions, of what took place in the trial court."

These rules remain unimpaired. See *Rogers* v. *Alabama*, 192 U. S. 226 (1904); *Martin* v. *Texas*, 200 U. S. 316 (1906), and also *Nixon* v. *Condon*, 286 U. S. 73, 89 (1932).

In view of the foregoing it is evident that the rights of the defendants in the cases under discussion have not been protected. These defendants were entitled to a full opportunity to prove the allegations that no Negroes were on the jury roll from which the grand jury was drawn and that the absence of such names was due to discrimination based on race prejudice. Having been denied this opportunity, one to which the Supreme Court has repeatedly said they are entitled, the conviction against them should be set aside and the indictments quashed.

CONCLUSION.

Defendants have established not only that their constitutional rights have been grossly violated but that the prosecution has made a disgraceful attempt to conceal that situation by a forgery of the official records. This attempt to avoid the issue throws upon all activities of the prosecution in this case a shadow which can never be removed while these indictments and the convictions obtained under them are allowed to stand. The Court is respectfully requested, therefore, not only in the interest of these defendants but also with regard to the proper administration of justice to quash these indictments.

POINT II.

Defendants' rights under the Fourteenth Amendment of the United States Constitution have been violated by the exclusion of Negroes from the trial venire.

This point involves the same constitutional question as was involved in the first point but

presents it in a different form. No attempt was made by the prosecution to prove that there were any Negroes on the jury roll of Morgan County. These jury rolls were in Court and were examined by numerous officials who picked out the names of individuals personally known to them. All persons so known were white. There was also testimony that no Negroes had ever sat on juries and that many Negroes were qualified to do so. Consequently the Court ruled that the defendants had made out a prima facie case of discrimination against Negroes in the selection of the jury roll. The State attempted to meet this presumption by offering the testimony of one of the jury commissioners and the affidavits of the other two. And upon this showing the Court held the presumption had been overcome. Defendants contend that the finding of the Court that there was no discrimination was contrary to the evidence and rested on nothing more than the unsupported statements of the jury commissioners themselves. Also, that this Court has power to review the evidence because the finding of the Court below was not based on testimony of witnesses who appeared before it in person. And they contend further that they were improperly restricted in their proof.

A. The Determination of the Court Below as to the Facts Will Be Reviewed by this Court and the Supreme Court of the United States.

The arguments advanced under the previous point showing that the finding of the Trial Court will be reversed if palpably wrong apply likewise to this motion.

However, on this motion, it is submitted no presumption whatever exists in favor of the decision of the Court below because that decision did not rest upon oral testimony taken before the Court itself. With one exception to be noted the evidence before the Court below consisted entirely of testimony which had been taken on the former trial before Judge Horton and which was read to the Court below (transcript, pp. 429, 491). The Court below, however, overruled the objection to one of the questions put to Mr. Tidwell which objection had been sustained by Judge Horton (transcript, pp. 486, 487). The witness, Tidwell, then appeared in court and answered a single question (transcript, p. 491).

Under these circumstances it is submitted that the rule applies, which was laid down by this Court in *One Liberty Roadster* v. *State ex rel Tate,* 206 Ala. 110, that the finding of the Court "is not supported by any consideration of its superior facilities for estimating the credibility of the testimony offered." Other cases of like character in which this Court has reversed the findings of the Court below where the witnesses had not appeared before the lower Court are *Wade* v. *Miller,* 208 Ala. 264; *May* v. *State,* 211 Ala. 449; *Cotton* v. *Courtright,* 215 Ala. 474 and *Alabama Farm Bureau Credit Corporation* v. *Helms,* 227 Ala. 636. In the *Wade* case and in the case last cited the testimony, as in the case at bar, was taken before a judicial officer other than the one whose decision came up for review and the same rule applied as where the testimony was taken by depositions. See also *Taylor* v. *Cowart,* 153 So. 403.

In the Supreme Court of the United States it is well settled that the facts will be reviewed in order to determine whether a constitutional right has been impaired, either where the finding is with-

out fair support in the evidence or where the question of fact is so integral a part of the legal question as to require a scrutiny of the one to determine the other. The rule is well stated in *Northern Pacific Railroad Company* v. *North Dakota*, 236 U. S. 585 at page 593. Some of the earlier cases on the subject are reviewed in *Kansas City S. R. Company* v. *C. H. Albers Commission Company*, 223 U. S. 573 at pages 591 and following. See also *Creswill* v. *Grand Lodge Knights of Pythias*, 225 U. S. 246, at pages 261 and 262, a case in which the Court, after reviewing the evidence, reversed the determination of the lower Court.

More recent expressions of the Supreme Court are to be found in *First National Bank* v. *Hartford*, 273 U. S. 548, where, at page 552, Justice Stone said:

> "The question is thus a mixed one of law and fact and in dealing with it we may review the facts in order correctly to apply the law,"

and in *Johnson Oil Refining Company* v. *Oklahoma*, 78 Lawyers ed. Adv. 130, Chief Justice Hughes said:

> "As the asserted Federal right turns upon the determination of the question of situs, it is our province to analyze the facts in order to apply the law, and thus to ascertain whether the conclusion of the State Court has *adequate support* in the evidence." (Italics ours.)

The same problem was discussed in a somewhat different way in *Ancient Egyptian Order* v. *Michaux*, 279 U. S. 737, where the Court said that in reviewing the denial by a State Court of an asserted Federal right:

> "It is our province to inquire not only whether the right was denied in its terms, but also whether it was denied in substance and effect by interposing a non-Federal ground of decision having no fair support".

In that case the Court held that the claim of laches sustained by the State Court was not supported by the evidence. And the decision was therefore reversed.

In *Truax* v. *Corrigan*, 257 U. S. 312, at page 324, Chief Justice Taft said, the Supreme Court would reverse a finding of a State Court denying a Federal right which was lacking "in substantial support", since otherwise "it almost always would be within the power of a State Court practically to prevent a review here."

In *Ex Parte Kemmler*, 136 U. S. 436, the Court intimated that it would review the finding of the highest Court of the State if it "had committed an error so gross as to amount in law to a denial * * * of some right secured by the Constitution of the United States." This ruling was referred to with approval in *Thomas* v. *Texas*, 212 U. S. 278. In that case, as in this, the contention was made that discrimination had been practiced in the selection of jurors. However, in that case it appeared there was a Negro on the grand jury which indicted the accused and Negroes on the venire from which the petit jury was drawn. The contention, therefore, was not that Negroes had been excluded but that the Negroes should have been selected proportionate

to their numbers in the total population of the county. The Supreme Court, of course, held that no such requirement was imposed by the Constitution and that in view of the facts and the careful opinion of the State Court the conclusion that there was no discrimination was justified. The Court, however, reserved the right to review a case where it would appear that the decision of the State Court constituted "such abuse as amounted to an infraction of the Federal Constitution."

It is submitted that the case at bar, both with regard to the motion to quash the indictment and the motion to quash the venire, falls within all the three grounds upon which the Supreme Court will review the facts. It has already been pointed out that the decision of the Court below that there were Negroes on the jury rolls is without evidence to support it. It is clear that the question of whether or not discrimination was practiced is a mixed question of law and fact. It will be argued hereafter that the decision of the Court below that no discrimination had been practiced was without support in the credible evidence. Therefore an affirmance of this decision by this Court would create a situation calling for review by the Supreme Court of the United States.

B. The Determination of the Court That There Was No Discrimination Was Erroneous.

Defendants proved without contradiction that no Negroes had served in Morgan County over a long period of years, although nearly 20% of the population consisted of Negroes (transcript, p. 478). The Clerk of the Court, J. H. Green, testified that not one out of 2,500 jurors who had

passed before him was colored (transcript, p. 429). He also said that during the foregoing thirty years he had never seen a Negro serve on any jury in the county (transcript, p. 430). A number of Negro residents of the county testified to the same effect: Dr. Frank Sykes (transcript, p. 434), Dr. N. E. Cashin (transcript, p. 437), H. J. Banks (transcript, p. 441), L. R. Womack, Minister of the First Missionary Baptist Church (transcript, p. 448), J. J. Sykes (transcript, p. 453), W. J. Wilson, Baptist Minister (transcript, p. 456), J. E. Pickett, a high school teacher (transcript, p. 459), Robert Bridgeforth (transcript, p. 462), W. J. Wood (transcript, p. 466), Dr. N. M. Sykes (transcript, p. 469).

Testimony was also given by all the foregoing witnesses regarding the qualifications for jury service of a large number of Negro residents of the county. Their names were given by Dr. Sykes (transcript, pp. 433, 434), Dr. Cashin (transcript, pp. 438, 439), Womack (transcript, pp. 449, 450), J. J. Sykes (transcript, pp. 453-455), as well as by some of the others.

Defendants then offered the jury roll in evidence and endeavored to establish that there were no Negroes on it (see transcript, p. 476). Sheriff Davis identified many persons, all white (transcript, p. 477). The Court thereupon ruled that a prima facie case of discrimination had been made out.

The evidence offered in rebuttal consisted of the testimony of one of the jury commissioners, Mr. Tidwell, and the affidavits of the other two. These affidavits (pp. 492-494) are not entitled to any probative force whatever. They are identical in language and consist merely of conclusions. No attempt is made in either one to show that the

qualifications of any Negroes were ever actually considered or discussed. The statement as to inquiry is evasive and indicates that it was made only "wherever practical". Moreover, in so far as these affidavits purport to demonstrate that the names of any Negroes were on the lists considered by the commissioners, they are purely hearsay. The lists were prepared by the clerk, who is not named in the affidavits. He himself gave no affidavit nor was he produced as a witness. The statement by the Court in its opinion (transcript, p. 496), that the members of the commission had actually examined the names of the colored people claimed by defendants to be eligible and had made inquiry regarding them is, therefore, not supported by any actual facts stated in either of the two affidavits.

Mr. Tidwell, however, testified that he had considered the names of those Negroes who had been proven qualified and had rejected them for reasons not connected with their race (transcript, pp. 481, 482). Nevertheless, except in one instance to be hereafter noted, he was able to give no reasons for his rejection. He admitted that he had consulted no Negro preacher nor any colored organization with a view to obtaining information about the qualifications of particular Negroes; nor could he name any colored person at all with whom he had advised on the subject (transcript, p. 483). When asked the direct question whether there was any Negro in the county who had the qualifications for jury service required by the statute, Mr. Tidwell said that he knew of none such (transcript, pp. 483, 484).

Defendants' counsel thereupon requested the witness to tell with which of the Negroes on the lists presented to the defense he was personally

acquainted. He was able to name only a few (transcript, p. 484). Among them was J. J. Sykes. In cross examination of Mr. Tidwell defendants' counsel then established that Mr. Sykes was intelligent, over twenty-one, had not been convicted of any crime, was not a drunkard, had no physical sickness or disease except a crippled leg and that there was nothing against his integrity (transcript, p. 485). When it was called to Mr. Tidwell's attention that he had practically established the qualifications of Sykes his only answer was one which did not apply: "I don't know who all we had on our list, we keep those on the list that are qualified and those we don't qualify we put them off the list" (transcript, p. 485). An attempt on defendants' part to find out whether Sykes was actually on the jury roll elicited the answer that Mr. Tidwell did not know (transcript, p. 485). Upon an inspection of the jury roll made in court it appeared that the name was not on the roll (transcript, p. 486) and the following question was asked: "The name of J. J. Sykes is not on that jury roll. Can you ascribe any reason for the disqualification of J. J. Sykes?" Although Judge Horton sustained an objection to that question (transcript, p. 486) Judge Callahan permitted it to be answered. The answer was that Sykes was badly crippled "and we had other information which we thought might affect his character" (transcript, p. 491). No other questions were permitted (transcript, p. 491).

On this state of the proof Judge Callahan denied the motion on the ground that he was reasonably satisfied that the selecting officers had so administered the law as not to have violated the Constitution (transcript, p. 497). Defendants excepted to this ruling (transcript, p. 497). They

now contend that it is unsupported by the evidence. As has already been noted, this Court has power to review the facts on an issue such as this where the testimony before the lower Court was taken either on affidavits or before another tribunal.

While the Court below stated in its opinion that the jury commissioners had taken into consideration the Negroes claimed to be qualified (transcript, p. 496), the evidence in no way bears out this contention. Properly analyzed, the testimony of Mr. Tidwell indicates that no attempt was made to find out whether any Negroes were qualified. The most that can be said for his testimony is, that the names of those Negroes stated by the defense to be qualified may have been before him, since many of these Negroes were voters and their names were on the voting list. There is no evidence to justify the conclusion of the Court below that these names had been excluded on account of any consideration bearing on the qualifications of the individuals. Rather, the inference is irresistible that the exclusion was based upon the fact that the individuals were Negroes. The conclusion is quite clear in connection with the case of J. J. Sykes. Originally, before Judge Horton Mr. Tidwell had admitted that Sykes possessed all the qualifications required by law. Although at that time he referred to Sykes' crippled leg, he made no effort to base the exclusion of the Negro on that ground. Before Judge Callahan, however, he gave it as one ground of exclusion along with undisclosed information about the man's character, information concerning which he had made no statement whatever at the earlier hearing. It is quite evident that Mr. Tidwell gave no honest reason for disqualifying Sykes. No attempt was made to justify

the exclusion of the large number of other qualified Negroes.

The Court's attention is in this connection again called to the case of *Lee* v. *State*, supra. In that case, as in the present one, an attempt was made to justify the selection of the jurors and the contention was put forth that no discrimination had been exercised by the selecting officer. The Judge charged with the duty of selection had not taken into account the fact that men were black or men were white but had selected men he knew to be suitable and said that it had merely happened that those selected were all white. The highest Court of the State rejected the assumption of propriety on which the lower Court had sustained these acts of the selecting officer. So in the case at bar it is submitted that no adequate proof exists to show that the jury commissioners really considered the qualifications of any Negroes. The evidence calls for a disregard of the self-interested statement of the jury commissioner. That ancient adage "Actions speak louder than words", is well in order. And the quotations already given from both the *Lee* case and *Neal* v. *Delaware* thoroughly apply.

There can be no doubt that the Fourteenth Amendment prohibits discrimination in the selection of petit jurors as well as of grand jurors.

As was said by Justice Strong in *Virginia* v. *Rives*, supra, which case dealt only with the panel of trial jurors:

> "It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them because of their color."

And Justice Harlan, in *Martin* v. *Texas*, supra, ruled as follows:

> "• • • if, upon the hearing of the written motion to quash the panel of petit jurors, the facts stated in that motion had been proved, or if the opportunity to establish them by evidence had been denied to the accused, the judgment would be reversed. • • •
>
> What an accused is entitled to demand, under the Constitution of the United States, is that, in organizing the grand jury as well as in the impaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color."

Under these authorities the decision of the Court below was erroneous and should be overruled.

C. The Court Erred in Depriving Defendants of an Opportunity to Prove Their Contentions of Discrimination.

There can be no doubt that if defendants are denied a full opportunity of proving discrimination then error has been committed. (See matter quoted from *Martin* v. *Texas* in previous subdivision of this point.)

That defendants were denied an opportunity of establishing discrimination is abundantly clear from the record. Defendants were hampered in their efforts to prove that there were actually no Negroes on the jury roll. The Court, in the first place, limited counsel to the present jury roll, to which ruling exception was taken (transcript, p.

476) and counsel were not permitted properly to examine Burleson as to his knowledge (transcript, p. 475). They were hampered in every possible way in their cross examination of Mr. Tidwell, who alone appeared to testify that there had been no discrimination. Mr. Leibowitz made effort to test the witness regarding his knowledge of the qualifications for jury service, in order to establish what elements were taken into account by the witness and if possible to establish more securely that the various Negroes referred to by the defendants' witnesses were qualified. A number of questions tending to this end were objected to by the State and objections sustained and exceptions taken by the defense (transcript, pp. 485, 486, 488-489).

Mr. Leibowitz attempted to find out what efforts had been made by the jury commissioner to find out whether the persons on the lists furnished by the defendants' witnesses were qualified for jury service. He was not permitted to do so however, and excepted to the Court's ruling (transcript, pp. 489, 490). Other questions, put with intent to test the good faith of the witness' statement that he had considered the names, were also objected to and excluded and exception noted (transcript, pp. 490, 491).

The Court allowed the witness to answer one of the questions which had been excluded before Judge Horton. This is the question, already quoted, which deals with the witness Sykes. It has been pointed out above how Mr. Tidwell's answer before Judge Callahan differed from part of his testimony before Judge Horton and how indefinite this answer was (see transcript, p. 491). After the testimony had been taken defendants' counsel asked the Court whether further inquiry

could be made on the subject. Permission was withheld and exception to the Court's ruling noted (transcript, p. 491). The Court's statement that defendants' counsel wanted this question alone answered, is of course, a misconception of the situation. That question was merely one of numerous questions which had been excluded by Judge Horton. There is no reason to suppose that had Judge Horton allowed the question to be answered counsel would not have pursued the inquiry further. He was making every possible effort to find out how much consideration Mr. Tidwell had actually given to the names of the Negroes on these lists and to test the good faith of his answer that he had exercised no discrimination. Counsel should have been allowed the fullest leeway in order to establish the facts. If he could prove that the witness was unworthy of belief it must, of course, have resulted in a finding by the Court that there was discrimination. He should not have been blocked in any legitimate effort to cross-examine this witness. Having, therefore, been unduly restricted such error was committed as necessitates the quashing of this venire.

CONCLUSION.

There can be no doubt that no Negroes were on the jury roll of Morgan County. A prima facie case of discrimination having been made out by the defendants the venire should have been quashed because the State did not produce any credible or satisfactory proof to rebut this prima facie case.

POINT III.

The Court erred in denying the application for a change of venue.

Before the trials in these cases opened defendants filed a petition for a change of venue supported by voluminous affidavits (transcript, pp. 168 to 332). The State introduced affidavits in opposition and also produced witnesses before the Court (transcript, pp. 332 to 413). Thereupon the motion was denied and exception duly taken (transcript, p. 418).

The motion was renewed during the examination of the jurors in the Norris case because it appeared that a large number of the prospective jurors had expressed fixed opinions concerning the guilt of defendants. To this denial exception was also taken (Norris transcript, pp. 507, 508).

No attempt will be made to review the evidence taken upon this motion because to do so will unduly extend the length of this brief. One or two main points will be briefly discussed, however. In the first place, the Court's attention is called to the fact that the evidence produced by the defendants clearly showed a high degree of hostility in the community not only toward the defendants but also toward their counsel. This hostility continued through the duration of the trials and necessitated the swearing in of a considerable number of special deputies to accompany defendants and their counsel to and from the court-room and watch over them (Patterson transcript, p. 762). Upon the hearing of the motion defendants introduced a pamphlet which had previously been circulated in the community (transcript, pp. 273-329). It was an open incite-

ment to passion and prejudice (see especially pp. 273, 287, 311, 314).

Most of the evidence the defendants produced consisted of statements which individuals in the community had made to an investigator for the defense. These statements show very widespread antagonism. While it is true that some of the persons referred to in the affidavits denied having made the statements attributed to them their denials are for the most part in the nature of formal affidavits, all identical in language, and can therefore have little probative value. It is also true that the defendants' investigator attributed remarks to a few people who turned out to have been dead. This was explained by the fact that it was not always possible for the investigator to obtain the actual name of the person with whom he was talking and that sometimes he had to draw conclusions as to the individual's identity from the place where the men happened to be.

That this Court must review the facts on such an application without presumption in favor of the judgment of the lower Court is well settled. The Code Section 5579 expressly so provides and this Court has so ruled in *Mallov* v. *State*, 209 Ala. 219.

This Court has laid down liberal rules for changes of venue. The leading case is *Seams* v. *State*, 84 Ala. 410, in which the Court said that no fair trial was possible "as long as the minds of the jury are liable to be influenced by a prevailing public prejudice against the prisoner. * * * The duress of public opinion is often insidious and potent, and the best of men sometimes become its victims, without being aware of it, or without the courage to resist the domination of its influence."

See also *Brown* v. *State*, 83 Misc. 645, and *Estes* v. *Commonwealth*, 229 Ky. 617.

It is submitted that a careful reading of the evidence on this motion, coupled with the unusually large number of jurors who admitted they had fixed opinions, indicates a state of hostility toward defendants which should, at least in the Norris case, have required the granting of the motion. From one group of 18 jurors called (Norris transcript, p. 501) 6 were excused because of a fixed opinion, which was not subject to change and one other juror was challenged for cause for having such opinion (Norris transcript, p. 502). From the next 18 jurors 2 were excused by the Court because of their fixed opinion (transcript, p. 503). From the first 12 jurors who appeared in court after the original panel was exhausted (transcript, p. 503) 8 were excused for fixed opinions and one more challenged for cause on account of such opinion (transcript, p. 504). Ten additional persons were then drawn of whom three were excused because of their fixed opinions (transcript, p. 504). The Attorney General's argument upon the renewal of the motion in that case (Norris transcript, p. 508) that the very fact that so many jurors had admitted having fixed opinions showed the fairness of the community, is specious. Some persons having a fixed opinion would conscientiously admit it; others in the same case might make no such admission and go into the jury biased nevertheless. Surely the existence of so large a body of fixed opinion as existed in this community cannot be disregarded.

Even though actual violence was not threatened at these trials and the militia did not have to be called out, nevertheless there was ample evidence of hostility. It was necessary to assign guards

to defendants' counsel as well as to have armed guards for the protection of the prisoners. And it would be blindness to suppose that a fair trial could be had in such an atmosphere. A reading of the evidence taken at the trials indicates that the verdicts were against the weight of the evidence. A calm and dispassionate consideration thereof should have resulted in a disregard of Victoria Price's testimony. Surely there was more than reasonable doubt regarding the guilt of both these defendants, and the failure of the two juries to give it weight indicates that they were overborne by passion or prejudice and that they held to the hostile sentiment of the community rather than to the calm warning of reason. The motion for a change of venue should have been granted.

POINT IV.

The Court erred in refusing to exclude for cause certain jurors challenged by the defense.

In both these cases a number of the jurors testified that they had opinions so fixed that it would require evidence on the part of the defendants to cause them to change them. Phil Humphrey, when asked whether because of such opinion more evidence would be required of the defense than if he didn't have such opinion, said: "I suppose it would take more evidence." A challenge for cause was overruled and exception noted (Patterson transcript, p. 503). A. T. Shropshire stated that he had an opinion which might be changed after hearing evidence but that it would take evidence to cause a change. He was also challenged for cause and an exception was taken to the Court's refusal to allow the challenge (Patterson transcript, p. 506).

In the Norris case Phil Humphrey was again examined and this time denied having any opinion at all (Norris transcript, p. 499). A challenge to him was overruled and exception noted (Norris transcript, p. 499). Mr. Watson stated that if the defendant did not offer evidence he would stick to his original opinion of guilt (Norris transcript, p. 506). The Court overruled the motion to challenge for cause because the prospective juror subsequently stated that if the evidence was not sufficient to convict he would acquit the defendant. Exception was noted to this ruling (Norris transcript, p. 506). Another prospective juror, Sivley, said that he would expect the defendant to produce evidence that he was not guilty (Norris transcript, p. 510) and when asked if he could lay aside his previous opinion and go into the jury box with an open mind, he said: "That would be pretty hard for me to do." An exception was taken to the Court's denial of a challenge for cause (Norris transcript, p. 511).

It is true that this Court has held that a juror is not disqualified merely because he starts with an opinion based upon what he has heard about the case, if he says it is subject to be changed by the evidence. See *Long* v. *State*, 86 Ala. 36; *Peterson* v. *State*, 227 Ala. 361.

However, it is submitted that the cases at bar differ from those which have been cited because in these instances the effect of the Court's ruling was to put on the defense the burden of proving the accused innocent. This violates the fundamental rights of defendants under the Constitution of Alabama and the general system of jurisprudence prevailing in this country. In the recent case of *Ex parte Grimmett*, 152 Southern 263, this Court held: "The defendant goes to trial

attended by the presumption of innocence." A juror who admits that he has an opinion which would be changed only were the defendant to introduce evidence puts the defendant in a position where he is deprived of that presumption. Such a juror is disqualified even though there be no express provision of the statute covering the situation. As this Court said in *Mutual Building and Loan Association* v. *Watson*, 226 Ala. 526, "Any ground which indicates probable prejudice will disqualify." See also *Roan* v. *State*, 225 Ala. 428. These cases lay down the rule that the statutory disqualifications are not exclusive.

Finally, the Court's attention is called to *Sorter* v. *Austen*, 221 Ala. 481, where it was said: "The right to challenge for cause is inherent in the right of trial by an impartial jury, and cannot be denied, where the right of trial by jury exists."

It is, therefore, respectfully submitted that under the particular circumstances of this case error was committed in failing to sustain challenges by the defense.

POINT V.

Defendants are entitled to a new trial because of the improper and prejudicial conduct of the Trial Court.

It is the contention of the defendants that the Court below showed by remarks, interruptions and other conduct such prejudice and hostility as to deprive the defendants of the fair trial to which they are entitled under the Constitutions of the State of Alabama and of the United States. Before reviewing the incidents in point we call this

Court's attention to its own decision dealing with the subject, as well as to a few decisions from other courts.

The leading case in this Court is *Griffin* v. *State*, 90 Ala. 596. In that case the defendant in order to show the bias of a witness wanted to prove by expert testimony that the witness had written a certain letter. The Court refused an adjournment for the purpose of procuring the expert, contending that the witness had in effect admitted bias, and said "I don't think * * * that it will amount to much, in view of this admission." This Court reversed the conviction on the ground that this comment of the Court was misleading to the jury and likely to influence it, saying:

> "We know that jurors are easily influenced by remarks from the bench, and the slightest intimations of the Court are seized upon and exert a controlling influence upon them. * * * Any statement by the Court, however unintentional, made in the presence of the jury, calculated to control the jury in its consideration of the weight to be given to testimony, will work a reversal, unless it be clearly shown that such remarks have been explained and excluded from them."

The salutary principle of this case was applied many years later in *Moulton* v. *State*, 199 Ala. 411. Counsel had requested the Court to prepare its charge in writing as was permissible under the Code. The Court remarked to the jury that this was the first time in the history of the Court that this requirement had been made. This Court reversed the conviction even though it was satisfied that the Judge did not intend to influence the jury, stating:

> "It is a matter of common knowledge that jurors are very susceptible to the influence of the presiding Judge, watching him with a quick understanding of every indication of opinion."

In the recent case of *Burns* v. *State,* 226 Ala. 117, this Court held improper, remarks made by the Court to the effect that a certain witness would not answer the solicitor's question unless it was the truth. See also *Daggett* v. *Boomer,* 210 Ala. 673, in which a reversal was based upon the Court's remark that the witness did not know what he had said on direct examination.

A conviction was reversed by the Court of Appeals in *Powell* v. *State,* 20 Ala. App. 606, on account of the Court's interference with questioning by counsel for the defendant, especially when the State had interposed no objection. The Court said in that case:

> "It is well known that humiliation brought to the defendant's counsel at the hands of the Judge presiding upon the trial of the case will inevitably, certainly, in all probability, re-act in the minds of the jury as something substantial against the defendant."

See also *Dennison* v. *State,* 17 Ala. App. 674; *Medders* v. *State,* 19 Ala. App. 628; *Haithcock* v. *State,* 23 Ala. App. 460, and *Holland* v. *State,* 24 Ala. App. 199. The *Medders* case is particularly in point because the Court in that case, as in the case at bar, frequently made unnecessary remarks while ruling on the exclusion of evidence and the Court of Appeals found:

> "The defendant's case was prejudiced against him by the manner of many rulings by the trial judge."

The Court's attention is also called to a recent New York case, *People* v. *Thomas,* 240 App. Div. 101. In that case the Appellate Court condemned the interruption by the Trial Court of defendant's questioning, where no objection had been interposed by the District Attorney. The case is also of interest as criticizing a charge, which, very much like the charges in the cases at bar, analyzed the contentions of the prosecution and said very little about the contentions of the defense. On this subject the language of the highest Court in New York is pertinent. In *People* v. *Becker,* 210 N. Y. 274, at page 306, the Court said of a charge held to be improper:

> "In his charge at the close of the trial the presiding judge defined with accuracy many of the principles of law which governed the jury in their consideration of the evidence and in the disposition of the questions of fact. He then outlined in much detail and most effectively the claims of the prosecution and the evidence which had been produced to support those claims, leaving it to the jury, with few and meagre exceptions, to evolve from their own unaided memories the recollection of any arguments or evidence in behalf of the defendant which tended to contradict and rebut such arguments and evidence of the prosecution."

Appellants are of the opinion that in the cases at bar errors were committed by the Trial Court of a nature similar to those which resulted in

reversals in the cases cited. In most of the latter reversal was predicated upon a single error. In the cases at bar there are many such errors. And the inevitable consequence must have been to impress upon the jury the Court's hostility toward the defense and thereby deprive the defendants of a fair trial.

a. Patterson Case.

The Trial Court began making improper remarks at almost the beginning of the Patterson case. During the very opening of the cross examination of Victoria Price defendants' counsel asked the witness whether she was divorced. The Court of its own motion stated: *"You needn't answer that"* and exception was taken to the ruling (transcript, p. 512). When the witness was asked whether March 24, 1931 was the date of her first freight ride, without objection by the prosecution the Court ruled that the witness need not answer, and counsel for the defendants excepted (transcript, p. 513).

Without any objection being made by the State the cross examination of the witness was constantly interrupted. Counsel for the defendants asked whether anyone accompanied Mrs. Price on the train and the Court interrupted, stating: *"I don't like to interfere, but I can't allow the time of the Court wasted on matters so immaterial. You must not ask that question again."* Exception was taken (transcript, p. 514). To the next question, whether the witness had had intercourse with any man the night before she left Huntsville, the Court volunteered: *"Wait a minute"* and this remark gave the hint to the Solicitor for the State, who thereupon interposed an objection which was sustained and excepted to (transcript, p. 514).

A very little later in the proceedings the prosecutor interrupted counsel for the defendants before he could finish his question and counsel remonstrated to the Court. The Court answered: *"And I will make known to you when I rule, too. Proceed if you want to ask another question"* (transcript, p. 515). Defendants' counsel having for a second time asked a question the Court remarked after counsel's exception (transcript, p. 516): *"That's twice you have asked that; don't let's have that any more"* (transcript, p. 517). And later when counsel said he wanted to ask a certain question in order to preserve defendants' rights the Court said: *"You needn't worry about the defendants' rights"* (transcript, p. 517). When a question was asked to which no objection was made by the State, the Court itself interrupted: *"That is far enough for me to know all I want to know, to know that the question is illegal."* Defendants' counsel excepted (transcript, p. 517).

To the question whether the witness had gone to Chattanooga to get work the Court interrupted again without any objection from the State: *"She said she did and that's enough"* (transcript, p. 521). To another question of the defense to which no objection was made by the State the Court said: *"Never mind that, go on with your questions"* (transcript, p. 522).

The witness having testified that the fight between the Negroes and the white boys occurred about three miles out from Stevenson, Mr. Leibowitz made some effort to find out whether she knew how far three miles was. The Court interrupted, saying: *"Mr. Leibowitz, I want you to*

get all you ought to know from the witness, but don't stand up and argue with the witness, don't do that'' (transcript, p. 524). A few minutes later the Court interrupted, stating: *''I think you have asked that enough''* (transcript, p. 529). A few questions later the Court again interposed the cross examination without objection by the State, saying: *''I think you have got enough of the leg over the gondola. Let's don't take up time on that, that is a waste of time. You have tested her recollection on that, all that is possible.''* An exception to these remarks was noted (transcript, p. 531) and another to the Court's interruption, again without action by the State, in which he said: *''I think that's enough on that''* (transcript, p. 532). A number of questions later the Court refused to permit the witness to answer a certain question: *''You have answered that enough''* and an exception was noted (transcript, p. 533). When it proved impossible to get from the witness a statement as to how many people had hit her, counsel made a number of efforts to do so. He was not permitted to ask the question whether more than one had hit her, the Court interrupting: *''That will do. She has gone over that enough to satisfy anybody, looks to me like.''* An exception was noted (transcript, p. 534).

After further cross examination the Court again interrupted Mr. Leibowitz, saying: *''Let's don't go into that again. I think the witness has answered that enough''* and an exception was taken (transcript, p. 535). A few questions later he interrupted: *''Mr. Leibowitz, you are just wasting time, in my judgment''*, and an exception was taken (transcript, p. 536). A similar interruption followed shortly after when the Court

said: *''That's enough of that, go on with something else''* and an exception taken (transcript, p. 537).

The witness was examined about food she had eaten. While she was trying to answer, the Court interrupted, saying: *''That's immaterial; you might just as well ask her what she had to eat here''* and exception was again noted (transcript, p. 538). A few questions later the Court made the remark: *''She has testified about all that''* (transcript, p. 538), and then to another question interposed the comment: *''That is arguing with the witness''* and exception was noted (transcript, p. 539).

There were certain inconsistencies between the testimony Victoria Price gave at this trial and that which she had given at the previous trial before Judge Horton. Mr. Leibowitz cross-examined at some length on the subject and finally asked the witness whether what she had said before Judge Horton was the truth. The Court of its own motion interrupted, saying: *''That is entirely improper''* and an exception was duly noted (transcript, p. 542). A few questions later the Court again of its own motion interrupted, saying: *''That's improper''* (transcript, p. 543) and still later interrupted the cross examination with the remark: *''That's what she said. No need of going over that again''* (transcript, p. 545). To another question the Court remarked: *''No, no, you needn't answer that''* and an exception was taken (transcript, p. 546). All these interruptions were without any objection whatsoever on the part of the State.

On the following day Mr. Leibowitz again examined the witness about discrepancies between her testimony as given at this trial and her tes-

timony before Judge Horton, referring particularly to that which concerned her condition at the time she was being examined by the doctor. The Solicitor objected to a certain question on the ground that it was an attempt to impeach the witness on an immaterial point. The Court then said: *"It looks that way but I will give him the benefit of it."* Mr. Leibowitz objected to the Court's remarks and the Court answered: *"Then don't do things like that"* to which exception was taken (transcript, p. 553).

When the witness was being cross-examined about her meeting with the Attorney General and with Gilley in preparation for these trials she was asked the question whether there had been any talk between them and the Court of its own motion interrupted: *"If you desire to lay a predicate, you are at liberty to do so, but going just at random like that, I don't think it is a proper way to get at it"* and an exception was taken to these remarks (transcript, p. 558). A few questions later the Court again interrupted: *"I think that's all useless"* and an exception was taken (transcript, p. 558).

Not only did the incidents cited show the Court's hostility toward the defense but they had the undoubted effect of crippling the cross examination of the prosecutrix.

During the examination of the farmer, Morris, when he was cross-examined as to whether he was near-sighted or not the Court interrupted, saying: *"I imagine this witness wouldn't know what you mean. Get down to something he can understand"* (transcript, p. 573). A few minutes later it interrupted with the remark: *"I think that is taking up time for nothing. You can have an exception and go on with something else"*

(transcript, p. 574). In a number of instances during the cross examination of this witness where a question had been asked, the Court, without any objection by the State, did not permit the witness to answer the question but instead asked a question of its own (transcript, p. 576). And when Mr. Leibowitz called the witness' attention to the fact that he was now testifying otherwise than he had testified on direct examination the Court interrupted, saying: *"Don't go over that again. The jury knows what he said."* Mr. Leibowitz excepted (transcript, p. 577); and when he tried to find out what the witness had observed about the clothing the girls had worn the Court interrupted: *"Don't take up time trying to find out about furs on the overalls"* (transcript, p. 578) and exception was taken. Again the Court said, regarding a question: *"That is the very thing I told you we was through with"* and an exception was taken (transcript, p. 578). Somewhat later it interrupted stating: *"That's enough of that"* and when counsel tried to explain the Court interrupted: *"You are mistaken, that is enough of that, go on to something else."* Mr. Leibowitz took an exception (transcript, p. 580). Almost immediately thereafter the Court interrupted in the middle of a question, stating: *"That's enough. It is my business to see that the witness is treated with respect and that is disrespectful. Don't say that any more."* When Mr. Leibowitz stated that he had not meant to be disrespectful the Court said: *"Well, go on, or something will be done"* (transcript, pp. 580, 581).

Instances similar to these occurred during the cross examination of the witness, Gilley. Mr. Leibowitz began to ask a question about what he

had done in Chattanooga and in the middle of the question the Court interrupted: *"I think you have gone far enough on that. Let's stop there, take an exception and go on with something else"* (transcript, p. 598). When Mr. Leibowitz made effort to question this witness about his contention that he had wandered throughout the country reciting poetry the Court interrupted: *"No, no, stop that. I don't like poetry anyhow."* Then when counsel asked the witness whether he knew what a grand jury was the Court interrupted: *"I guess most people do. Don't waste time on things like that"* and exception was duly noted (transcript, p. 599). Somewhat later the Court again interrupted: *"I don't see the need of going further into that"* and an exception was noted (transcript, p. 600). The Court later interrupted with the remark: *"That's enough of that"* (transcript, p. 603) and on another occasion stated: *"I reckon that's enough on that"* (transcript, p. 606).

During the examination of Dr. Bridges Mr. Leibowitz endeavored to establish that Dr. Bridges had been subpoenaed by the State in the very case on trial although he had not been called. The Court thereupon interrupted of its own motion: *"Now that is improper. I have ruled on that, this is the third time. That's enough"* and exception was taken (transcript, p. 642). Actually the Court had not ruled on this question before, although it had excluded questions directed toward showing that Dr. Bridges had been subpoenaed by the State at other trials.

The climax of the Court's series of interferences occurred during the examination of the defense witness, Lester Carter. The Court interrupted his testimony with the remark: *"Never mind about the time you were in jail"* (transcript,

p. 663) and shortly thereafter interrupted a question by Mr. Leibowitz with the following statement: *"That has been raised so often, Mr. Leibowitz; I have ruled on that very legal point a half dozen times and there can't be anything in it except a vicious attempt to get something before the jury which I have ruled is improper."* Mr. Leibowitz noted an exception with a special reference to the Court's remarks (transcript, p. 663) and then moved for a mistrial. This the Judge declined to grant; but he withdrew the word vicious, admonishing the jury that they pay no attention to it. Mr. Leibowitz noted an exception (transcript, p. 664).

It is obvious that, coming as this incident did, after all the previous altercations between Court and counsel, the meager admonition to the jury that the word "vicious" be withdrawn could not eradicate from these men's minds the fact that the Court was hostile to the defense and particularly to the defense's chief counsel. The Court had no right to interrupt the question and should certainly have awaited an objection from the State. Even when it was called upon merely to sustain or overrule the objection. It might have been proper for the Court to have reminded counsel in moderate language that the legal point under discussion had been already raised and that the Court did not think it necessary for it to be raised again. Certainly the Court's action in this particular, as in the many preceding instances already quoted, was wholly unwarranted and was indefensibly and indubitably calculated to prejudice the defense in the minds of the jury.

There were a few more instances of objections which the Court interposed without any action being taken by the State. In one, the Court re-

fused to allow the question to be asked how the group of people came to go to the station in Huntsville (transcript, p. 664). At another time, when Mr. Leibowitz tried to find out whether the witness had seen one of the prosecuting officials at Scottsboro, the Court interrupted: *"That is not legal"*; and exception was taken (transcript, p. 673).

The inimical attitude of the Court again showed clearly at the time when Mr. Leibowitz requested an adjournment to await the arrival of Ruby Bates' deposition. Counsel made the remark that he had applied for the interrogatories "at the earliest possible time." The Court for no reason objected to this statement and remarked that these words *"would be surplusage."* Mr. Leibowitz took an exception and then the Court snapped out: *"All right, you have that twice"* (transcript, p. 725). The record, of course, cannot reproduce the tone of the Judge's voice but the words themselves leave no doubt of what nature it must have been.

Not once during this entire trial did the Court interrupt a single question the prosecutor asked or of its own volition interpose a single objection to any of the prosecution's questions, on either direct examination or cross examination of any witness.

And the attitude and point of view of the Court in this case looms into relief by virtue of the remarkable circumstance that the Court ended its charge to the jury with a statement of two forms of verdict which could be brought in, each of them on the assumption of the defendant's guilt, and gave no instructions whatsoever regarding the form of verdict which could be based on a finding of innocence (transcript, p. 779). No more

eloquent indication could possibly have been made to the jury of the Court's own view of this case. And the fact is particularly true when we realize that in its charge the Court analyzed the State's contentions in some detail, itemizing all the elements of corroboration the State had relied on (transcript, pp. 738, 739). Except for one isolated reference to the defense (transcript, p. 739) the Court in no place outlined the defendants' contentions. The charge as a whole was one unmistakably unfavorable to the defense. And it must have left in the minds of the jury the clear impression that the Court desired a conviction.

It is true, of course, that after his attention had been called to it by counsel Judge Callahan added to his charge the necessary instructions with reference to a verdict of acquittal (transcript, p. 779). But the impression of the Judge's attitude had been irrevocably given. Nothing could eradicate that from the minds of the jury.

b. Norris Case.

In the Norris case the hostility of the Court was less marked. It is possible that certain public comments on the earlier trial may have had a chastening effect upon the attitude of the Tria! Judge.

Nevertheless, during the cross-examination of Victoria Price unnecessary and prejudicial remarks were made by the Court. When Mr. Leibowitz suggested to the witness that she look at him and not at the prosecuting attorney, the Court interrupted with the remark: *"Now, Mr. Leibowitz, don't proceed along that line any more"* (Norris transcript, p. 518). Later, without objection by the State, the Court interrupted Mr. Leibowitz and said: *"I see that you have gone far*

enough with it myself, to make that question illegal, and I sustain the objection to it.'' Exception was noted (transcript, p. 522). When the Attorney General objected to the next question the Court, in addition to sustaining the objection, stated: *''Mr. Leibowitz, that question was so palpably illegal that you should not have asked a question like that''* (transcript, p. 522). Defense counsel not only excepted to the admonition but moved for a mistrial and excepted to the denial of the motion (transcript, p. 523).

Later in the proceedings the Court remarked: *''I don't see any use in taking up time with that. I would imagine that anyone with common sense would know which was the barrel of a pistol''* (transcript, p. 526). Mr. Leibowitz excepted to this statement. The latter portion of it is certainly most prejudicial and almost identical in nature with the remark which formed the basis of the reversal in the *Griffin* case. When counsel, proceeding, tried to find out from the witness whether she was unable or unwilling to answer a certain question the Court interrupted, saying: *''That question is improper and you have no right to ask it. It is my business to see the witness is fairly treated;''* and when Mr. Leibowitz said he thought the witness had been fairly treated, the Court remarked: *''I don't think so. I think that question was entirely improper.''* The defense took an exception (transcript, p. 529).

The way in which the Court came to the assistance of the prosecutrix constitutes a further indication of its attitude. On cross examination Mr. Leibowitz asked Mrs. Price a number of questions tending to show that as a result of each intercourse her body had been wet with semen. She had testified that each time she had become

a little wetter. The Court interrupted the examination with the following question: *''Do you know that of your own knowledge? Did you notice at the time that you were, or did you pay any attention to that?''* This question was uncalled for because the witness was being asked about something within her own knowledge; and the only effect it can have had was to put into her mind the thought that she could avoid answering by saying she had not noticed at the time. Falling in, of course, with the Court's suggestion Mrs. Price answered: "I didn't pay any attention." An exception was taken by the defense (transcript, p. 531).

While it must undoubtedly be conceded that during the trial of a case the Judge has the right to ask questions, it is obvious that he must not ask them in such a way as to show partiality to one side or another. The instance just cited was an evident attempt by the Court to assist a State's witness and to lessen the effect of a cross examination which was bound to be damaging to the State's case. As such it constitutes an improper interference with the orderly and fair conduct of the trial, and ground for reversal. The effect of the Judge's question becomes clearly apparent in a comparison of the witness' testimony as given before and after he put it (transcript, p. 531).

On one or two occasions the Court went out of its way to emphasize the fact that a question was excluded because it was illegal and cautioned the jury not to pay attention to the answer (transcript, pp. 522, 554). In both cases exception was noted by the defense.

During the cross examination by the prosecution of the conductor of the train a question was started on the assumption that the witness had given certain testimony. Mr. Leibowitz inter-

rupted to point out that that was not so. The Court made the unnecessary comment: *"Mr. Leibowitz, you have no right to tell what the witness said or didn't say"* (transcript, p. 562).

A number of times the Court restricted the cross examination without any objection being made by the State, remarking at one time: *"I think you have gone far enough on that"* (transcript, p. 581). Exception was taken. A few minutes later the Court interrupted and stated: *"You have been all over that. I wouldn't take up time with that"* and another exception was taken (transcript, p. 581). Some time later the Court interrupted a question as follows: *"That is argument. Gentlemen that is ruled out."* An exception was taken (transcript, p. 582).

During the examination of Lester Carter in sustaining an objection the Court remarked to the jury: *"That question is not legal and highly improper and you will pay no attention to it"* (transcript, p. 608). An exception was taken. Somewhat later he made the same remarks in somewhat different form: *"Gentlemen of the jury, that question is illegal and highly improper, and the answer that was made to it was illegal and improper"* (transcript, p. 609) and exception was again noted (transcript, p. 610).

In this case as in the previous one the Court in its charge summarized in some detail the State's contentions (transcript, pp. 633, 634). The one thing stated about the defense's claim was that the defense was entitled to be heard. No attempt was made to analyze its contentions in any detail whatsoever.

To sum up this point in our argument we will note briefly that on innumerable occasions the Court interrupted questioning by the defense, interposed objections to questions of the defendants' counsel without objection from the State, and made remarks to the jury calculated to reflect adversely upon defendants' counsel. The Court's partiality was made manifest throughout the trials down even into its charges. Conduct such as this cannot be condoned. By no stretch of the imagination can it be said that defendants so tried had that fair trial warranted to them by the Constitution of the State of Alabama. Under the very well considered decisions of this Court already cited, conduct on the part of the Trial Judge of the kind described constitutes reversible error.

POINT VI.

The Court erred in excluding evidence to impeach the prosecutrix Victoria Price.

In each case defendant sought to impeach the prosecutrix by asking her whether or not she had been convicted of a crime involving moral turpitude. When the questions were first asked the Court refused to permit them to be answered because the witness apparently did not understand what moral turpitude meant (Patterson transcript, p. 519; Norris transcript, p. 519). Mr. Leibowitz subsequently asked her the direct question whether she had ever been convicted of the crime of adultery (Patterson transcript, p. 519; Norris transcript, p. 519). To this question Mr. Knight in each case entered a general objection which the Court sustained and exception was duly noted.

The Code, Section 7723, expressly permits the examination of a witness concerning his convic-

tion for crime. See *Craven* v. *State*, 22 Ala. App. 39, *Carmack* v. *State*, 23 Ala. App. 368.

Adultery is a crime in Alabama (Code, §3198). Section 7723 has, however, been construed in connection with Section 7722, with the result that examination may be had only of a crime which involves moral turpitude. It is submitted, therefore, that the only question to be determined is whether the crime specified in the question does involve moral turpitude. See in this connection 40 Cyc. 2607, 2646, and cases cited.

Whether or not an offense involves moral turpitude depends upon whether or not there is inherent immorality in the act. See *Pippin* v. *State*, 197 Ala. 613. In *Ex Parte Marshal*, 207 Ala. 566, this Court held that a violation of liquor laws did not constitute moral turpitude because such a crime was not inherently wrong but had been made so only by recent laws.

Adultery, however, is not a crime created by modern legislative vagaries. It has been considered an offense against morals from time immemorial and is probably one of the four or five offenses condemned by the moral codes of practically all communities. See the discussion by H. L. Mencken in his recent book: "A Treatise on Right and Wrong", pages 7, 89.

Adultery has been specifically held to be a crime involving moral turpitude in *Sexton* v. *State*, 48 Tex. Cr. 497; *Morrison* v. *State*, 85 Tex. Cr. 20, and *Ex Parte Rodriquez*, 15 F. 2nd 878. See also *Ranger* v. *Goodrich*, 17 Wisc. 80.

A good definition of moral turpitude is to be found in the decision of Judge Walker of the Circuit Court of Appeals of the District including Alabama in the case of *Coykendall* v. *Skrmetta*, 20 F. 2nd 120:

> "The words 'moral turpitude' as long used in the law with reference to crimes, refer to conduct which is inherently base, vile or depraved, contrary to accepted rules of morality, whether it is or is not punishable as a crime."

There can hardly be any doubt that under the authorities adultery is a crime of such nature that under the Alabama Code a witness may be cross-examined in connection with a conviction therefor. The failure of the Court to permit the cross examination of Victoria Price was, therefore, reversible error.

This error became emphasized in the Judge's charges. In these he expressed the opinion that the credibility of a witness can be impeached only by proof of reputation (Patterson transcript, p. 743; Norris transcript, pp. 635, 636). As has been already indicated, that statement is erroneous. And accordingly the defendants in these two cases were deprived by the Court of the opportunity of discrediting the chief witness against them and prejudicial error was thereby committed.

POINT VII.

The Court erred in excluding evidence of prior acts of intercourse of the prosecutrix.

It will be remembered that at the first trials of these cases the prosecution proved by the testimony of the doctors who examined the girls that semen was present in the vaginas of both (see Weems transcript, pp. 27-32; Patterson transcript, pp. 27-28; Powell transcript, p. 25). At the trial before Judge Horton, as appears from

his opinion, the State produced Dr. Bridges who gave similar testimony.

At the trials now under review the State did not produce Dr. Bridges as a witness. In its presentation of the Patterson case to the jury it did, however, rely upon the presence of semen in the body of Victoria Price (See Patterson transcript, p. 739).

It will also be remembered that, in addition to testifying to the alleged intercourse, Victoria Price produced the step-ins which she claimed she wore while being raped and which she says were then torn apart (Patterson transcript, p. 510; Norris transcript, p. 536). She also testified to the existence of semen on her body and clothes (Patterson transcript, pp. 547, 550).

To meet the corroboration which, it might be argued, had been given Victoria Price's story by the production of the step-ins and the finding of semen in her body, the defense offered to prove other acts of intercourse committed by Victoria Price within the two days preceding the alleged rape. In his opinion setting aside the second Patterson trial Judge Horton reviewed the evidence on this subject and recognized its force, stating:

> "Her condition was clearly due to the intercourse which she had had on the nights previous to this time."

In the Patterson case Judge Callahan also recognized in his charge the importance of the finding of semen in the woman's body and said that the presence of semen was "subject to explanation" (transcript, p. 740). He advised the jury, however, that the explanation must be based on evidence, not on suspicion. And he emphasized

in this connection that when he had excluded a question the jury had no right to speculate on what the answer to it might have been and then take that supposititious answer into consideration. Otherwise, "the party has gotten as much benefit from an adverse ruling as he would have gotten from a favorable ruling" (Patterson transcript, p. 741).

The language of the Judge on the subject of corroboration is important on account of the emphasis he gave this matter in his charge to the jury and his recognition of the fact that explanation might change the inference of corroboration. It follows:

> "Now, the state claims or contends that Victoria Price is further corroborated in that there was semen in the vagina and on other parts of the private parts. Well, as I understand it, there is no contention, and the point of contention does not center around that particular point. It is not claimed, as I understand it, that there was no semen found. The finding of semen certainly establishes one point, or one fact, and that is that Victoria Price had had sexual intercourse with a man. Then, the question on that point arises, how come it there? This must be met from the evidence or from reasonable conclusions drawn therefrom. Of course, standing alone, and standing unexplained, the fact that it was found there, does, in law, in a sense, corroborate the statement or claim rather of the prosecutrix that she had been raped. But it is not conclusive; it is not absolute; it is only one of the circumstances to be considered. It is subject to explanation, but gentlemen of

the jury, it must be explained by the evidence, or natural, logical conclusions to be drawn from the evidence, and evidence means evidence in the case" (Patterson transcript, pp. 739, 740).

The Court nevertheless excluded all the evidence offered by the defense for the purpose of explaining the alleged corroboration of Victoria Price, evidence clearly relevant and which therefore should have been admitted.

After Mrs. Price had testified on direct examination in the Patterson case that her step-ins had been torn apart (Patterson transcript, p. 510) and that she had been examined by two doctors at Scottsboro (transcript, p. 512), and after it had been developed that she had left Huntsville the day before the alleged raping (transcript, p. 513), she was asked the following question:

"Had you had sexual intercourse with any man the night you left Huntsville?"

The Court sustained an objection to this question and refused to hear the reason why it was asked. Exception was taken (transcript, p. 514). Another question was asked as follows:

"Did you have any intercourse with any men the day before that?"

Objection was similarly sustained and the Court would not hear the reason for the question even in the absence of the jury (transcript, p. 514).

The witness was asked:

"Did you that night, in Chattanooga, have intercourse with Orville Gilley?"

An objection was again sustained (transcript, p. 517).

Every effort to trace the movements of Victoria Price between the time of her arrival in Chattanooga, the night before the alleged raping, and her departure the next morning, were blocked by the Court. The exceptions to these rulings will be discussed separately.

It was brought out on the cross examination that she claimed that upon her arrival at Paint Rock her body and clothes were wet with semen (transcript, p. 547) and that at the time she was examined by the doctors her legs were a little wet: "There was enough for him to tell it all right" (transcript, p. 550). She also testified as to bruises on her body (transcript, pp. 551-553).

The State having failed to call Dr. Bridges the defense put him on the stand. He testified in some detail regarding the finding of semen on the walls of Victoria Price's vaginal canal (transcript, pp. 644-648). He stated that the spermatozoa he had found were not moving, an indication that they were dead (transcript, p. 645). He was unable to fix the time of the intercourse which had produced this semen and said: "It might have been any time before" (transcript, p. 647). He finally stated that intercourse had been "recent, but I wouldn't put the hours and minutes on it." He refused to place it within two days, stating specifically that he could not place it within twenty hours (transcript, p. 648).

The defense then offered to prove by Lester Carter that Victoria Price had had intercourse within two days of the finding of the semen. The Court would not even let counsel finish the question (transcript, p. 663). Carter had given testimony before Judge Horton to the effect that Vic-

toria Price had had intercourse with Tiller the night before the girls left Huntsville (see transcript, p. 773).

In the Norris case similar questions were asked and excluded. Victoria Price was asked whether she had had sexual intercourse with Lester Carter or Gilley the night before the alleged raping (transcript, p. 522). An objection to the question was sustained and an exception noted (transcript, p. 523). Gilley was asked: "Did you, Victoria Price, Ruby Bates and Lester Carter spend the night together and have intercourse in the hobo jungles opposite the freight yards in Chattanooga?" (transcript, p. 577) and exception was noted to the Court's sustaining of the objection (transcript, p. 578). Carter was asked a similar question with regard to the night before he left Huntsville (transcript, p. 607) and another as to the night in Chattanooga (transcript, p. 608). Exceptions were taken to both these rulings. The deposition of Ruby Bates contains testimony on this subject, which, although it was not read to the jury, shows what the answers to the other questions might well have been. The twelfth question which was excluded related to the acts of the girls on March 23rd, the day before they left Huntsville. Ruby Bates testified to acts of intercourse between herself and Lester Carter and between Victoria Price and Jack Tiller (transcript, p. 587). At that trial Dr. Bridges did not testify on the subject of semen but Victoria Price herself testified that there had been semen on her body (transcript, p. 531).

Thus in both cases the Court excluded all evidence tending to establish on the part of Victoria Price acts of intercourse pre-dating the alleged raping and perhaps explaining her condition and

that of the step-ins. It will be conceded, of course, that in the ordinary rape case previous unchastity of the prosecutrix is irrelevant except when the issue is one of consent. But the law is otherwise where the purpose of the testimony is not to cast a shadow on the character of the prosecutrix but to explain evidence otherwise material to the issue of rape. In cases where bruises, disease, pregnancy, semen or other physical facts have been added to the bare story told by the prosecutrix, evidence of acts of intercourse on her part which might account for these physical facts has been allowed. These cases proceed upon the theory that the acts of intercourse have become relevant as explaining evidence which might otherwise point to the guilt of the accused and explaining it in a manner consistent with his innocence. In cases of this description exclusion of evidence of such acts of intercourse has been held reversible error.

The general rule is set forth in 52 Corpus Juris 108: "Specific acts with others than defendant may be shown to rebut corroborating circumstances"; and in Alabama this rule was so laid down more than half a century ago and has never been questioned. In *Nugent* v. *State*, 18 Ala. 521, there was evidence that the private parts of the complainant were inflamed and that this was due to disease. A conviction was reversed because of exclusion of evidence of prior acts of intercourse. The then Chief Justice said:

> "The existence of the disease and the injury to her person were facts corroborative of the testimony of the girl, for they tended strongly to show that someone had attempted to have sexual intercourse with her and it was certainly competent for the prisoner to

> show that these facts could have existed consistently with his innocence; for such proof would to some extent weaken the presumption of guilt, that would result from the existence of disease and the injuries to her person."

Other jurisdictions have applied the same rule to a variety of circumstances.

Where there was evidence of a ruptured hymen see *Sherwin* v. *People,* 69 Ill. 55; *Richardson* v. *State,* 100 Miss. 514; *People* v. *Brehan,* 218 App. Div. (N. Y.) 266; *State* v. *Apley,* 25 No. Dak. 298; *Bader* v. *State,* 57 Texas Cr. 293.

Where there has been testimony of bruises see *People* v. *Knight,* 43 Pac. (Calif.) 6; *Stafford* v. *State,* 285 S. W. (Texas) 314.

Where there has been evidence of venereal disease see *People* v. *Fong Chung,* 5 Calif. App. 587; *State* v. *Height,* 117 Iowa 650.

Where there has been evidence of pregnancy the cases are very numerous. The leading case is perhaps *Fuller* v. *State,* 23 Ariz. 489. See also *Thomas* v. *State,* 178 Ark. 381; *Gilbert* v. *Commonwealth,* 204 Ky. 505; *State* v. *Williams,* 161 La. 85; *People* v. *Flaherty,* 79 Hun (N. Y.) 48, affd. 145 N. Y. 597; *Bice* v. *State,* 37 Texas Cr. 38; *State* v. *Martin,* 102 W. Va. 107.

The only case found in which the presence of semen was specifically mentioned by the Court in its opinion is *State* v. *Smailes,* 51 Idaho 321. In that case the general rule was accepted as here stated but the conviction affirmed, because the prior acts relied on were remote in time and medical testimony had indicated that live germs would not be found after two or three days. Of course, in the case at bar the germs were dead and the

acts of prior intercourse concerning which evidence was offered had all taken place within two days of the finding of the semen. Under the rule of this recent Idaho case, therefore, the evidence should have been received.

It is true that there are some cases which rest the rule upon the theory that the State has opened the door for the testimony by itself offering the corroborating circumstances and that, following this alleged reason for the rule, some authorities have refused to apply it in cases where the corroborating facts were produced by the defense either on the cross examination of a State witness or as part of its own case. See *People* v. *Kilfoil,* 27 Calif. App. 29; *State* v. *Menard,* 169 La. 1197.

On the other hand, where the corroborating circumstance was elicited by a question put by the Court, evidence of acts of prior intercourse was held proper. *Thomas* v. *State,* 178 Ark. 381. See also *Gilbert* v. *Commonwealth,* 204 Ky. 505.

In *Graham* v. *State,* 67 S. W. 2d 296 (Texas), evidence was admitted because it was deemed material on the general issue before the Court. There can be no doubt about the materiality of the evidence in the cases now under review, particularly in view of the testimony of Victoria Price that she had been examined by physicians immediately after her arrival at Scottsboro and her claim that her step-ins had been torn, all of which testimony was given on direct examination, and of her testimony on cross examination as to the presence of semen on her body. It was competent for defendants to show that the conditions concerning which the prosecutrix testified might have been caused by acts other than those to which she attributed them. The testimony of prior acts of intercourse

should have been received since it was not offered to impugn the chastity of the prosecutrix but for the sole purpose of explaining circumstances which otherwise might be taken as corroborative of her story. That the failure to permit such evidence to go before the jury was prejudicial cannot be denied. Indeed the very charge of the Court below in the Patterson case makes this abundantly clear. For these errors alone the judgments appealed from should be reversed.

POINT VIII.

The Court erred in excluding relevant and material testimony offered by the defense.

The Court below improperly restricted the cross examination of the prosecuting witness and limited the proof of the defense in a number of particulars other than those already considered.

It is, of course, clear that the exclusion of relevant and material testimony constitutes reversible error. The chief difficulty in the recorded cases seems to be in determining whether or not the evidence was relevant. This Court has adopted a liberal policy with regard to evidence offered by a defendant in a criminal case. As was said by Chief Justice Brickell in *Burton* v. *State,* 115 Ala. 1:

> "Grave as is the duty resting upon the Court to guard against the introduction of irrelevant evidence, the duty is of equal gravity to submit to the jury all evidence of facts, having a tendency, though remote, to the elucidation of the case in any of its aspects."

In the case at bar most of the matter excluded related to the movements of Victoria Price during the night before her return journey. At the first of the Scottsboro trials she had testified to having spent the night before the alleged raping in Chattanooga with an acquaintance, Callie Brochie (Weems transcript, p. 19). Before Judge Horton she repeated the same testimony (Patterson transcript, pp. 768-770), but on that trial it was established that no such person as Callie Brochie existed and that a night spent with Callie Brochie was merely another of the fabrications offered by the prosecuting witness (Patterson transcript, pp. 776, 777). In his opinion setting aside the second Patterson conviction Judge Horton said of this episode:

> "Victoria Price, said that she and Ruby Bates went to Chattanooga seeking work; that they went alone and spent the night at Mrs. Callie Brochie's, a friend of hers formerly living in Huntsville, but had moved to Chattanooga. Was this true? The Chattanooga Directory was introduced in evidence; residents of Chattanooga, both white and colored, took the stand stating that no such woman as Callie Brochie lived in Chattanooga and had not ever lived there so far as they knew. Though Victoria Price first made this statement more than two years ago at Scottsboro, no witness was offered either from Chattanooga or Huntsville showing any such woman had ever lived in either such place."

However, at the trials now under review every effort to bring out any of these particulars was blocked. On cross examination Victoria Price was asked, with reference to her actions in Chatta-

nooga: "When you got off the train where did you go?" (Patterson transcript, p. 516). She was also asked: "Did you stay at a rooming house in Chattanooga kept by a woman called Callie Brochie that night?" (Patterson transcript, p. 518). "Did you look for work in Chattanooga?" (Patterson transcript, p. 521). Objections to these questions were sustained and exceptions noted as to the first and last question.

In the Norris case she was asked: "Mrs. Price, did you speak to any person in Chattanooga, just yes or no, please." This question was objected to, objection was sustained and exception noted (Norris transcript, p. 521). To the next question: "Did Gilley bring you some food in Chattanooga?" an objection was also sustained, with the added comment that the question was excluded because it was illegal. The prosecutor did not even permit counsel to finish his succeeding question which finally was reframed to read as follows: "I am going to ask you, Mrs. Price, if you spent the night in Chattanooga in a wooded section near the railroad yards." Of its own motion the Court ruled this question out as illegal and exception was noted (transcript, p. 522). Nor was the witness permitted to answer the following: "Did the man by the name of Gilley give you a little box of snuff in Chattanooga?" An exception was duly noted (transcript, p. 523).

In considering these matters it should be borne in mind that the Court had allowed examination concerning the movements of Victoria Price from Huntsville to Chattanooga on the day before the alleged raping (Patterson transcript, pp. 515, 665, 666; Norris transcript, p. 521). A body of testimony exists, of course, regarding what happened

in Chattanooga on the morning before the alleged raping. A story of the events of the intervening hours was necessarily relevant to the giving of a complete picture of the background of the case. Furthermore, the defense was entitled to show either that the prosecuting witness was telling a different story now from that which she had told at the earlier trials or else that her story as to her actions in Chattanooga was wholly false. There was no justification for the arbitrary elimination from the consideration of the jury of what occurred from the time the girls arrived at Chattanooga until they were ready to leave. It should also be observed that none of these questions necessarily involved in their answers any acts of intercourse between Victoria Price and other persons and that they could all have been answered without bringing that issue in.

The defense was not permitted to ask Gilley relevant questions as to his contact with the girls during the night under discussion (Patterson transcript, pp. 597, 598; Norris transcript, pp. 577, 578). Similar questions addressed to Carter were not allowed (Patterson transcript, pp. 667-669; Norris transcript, p. 608); and almost all the questions asked Ruby Bates on this subject were excluded. When this was not the case her answers were materially curtailed. We call the Court's attention in particular to questions 6, 8, 11, 12, 14, 15, 17, 18, 19 and 20 (Norris transcript, pp. 586-591). Exceptions were noted to all these rulings.

In the Patterson case questions concerning a conversation with the girls were asked of a Negro named Ramsey, who had seen these two girls in Chattanooga on the morning before the alleged raping. Objections were sustained and exceptions noted (Patterson transcript, p. 687). It was

brought out from questions put to this witness that his companion on that occasion, E. L. Lewis, was dead at the time of the last trials (Patterson transcript, p. 686). Lewis' testimony taken before Judge Horton was then read (Patterson transcript, p. 698). Practically all the material questions put to Lewis were objected to, objections sustained by the Court and exceptions noted (Patterson transcript, pp. 699-715).

In one of the affidavits submitted in connection with the motion for a new trial the general character of the testimony given before Judge Horton by these two witnesses is set forth (Patterson transcript, pp. 777, 778). Judge Horton considered the incident of importance and showed it in the following comment:

> "History, sacred and profane, and the common experience of mankind teach us that women of the character shown in this case are prone for selfish reasons to make false accusations both of rape and of insult upon the slightest provocation, or even without provocation for ulterior purposes. These women are shown, by the great weight of the evidence, on this very day before leaving Chattanooga to have falsely accused two negroes of insulting them, and of almost precipitating a fight between one of the white boys they were in company with and these two negroes. This tendency on the part of the women shows that they are pre-disposed to make false accusations upon any occasion whereby their selfish ends may be gained."

We submit that the defense was thus materially hampered in its attempts to show that the story

of Victoria Price did not merit belief. Issues material to the case were not permitted to be cleared up and prejudicial error was committed.

POINT IX.

The Court erred in not rebuking the appeal to passion made by the Attorney General in his summation in the Patterson case.

Defendant's counsel objected to the statement of the Solicitor "That if you cannot avenge the assault on Victoria Price, you cannot stop the attacks on womanhood," on the ground that it constituted an appeal to passion and prejudice in the jury. A request was made for a mistrial. The Court overruled the motion and exception was taken (Patterson transcript, p. 730). Thereupon the Solicitor said: "Yes it is an appeal to passion. * * * We all have a passion for protecting our womanhood" (transcript, p. 780). Counsel objected to the repetition of this statement. The Court refused to take further action in this connection (transcript, p. 730).

There can be no doubt that the purpose of the Attorney General in making the quoted remarks, and particularly in repeating them, was to arouse the jurors and induce them to render a verdict for reasons extraneous to the case, and regardless of the evidence in the case. It was also an appeal to the audience assembled in the court-room to express its approval and thus convey its sentiments to the jury. Such practices have been universally condemned by the Courts of this State.

For the Courts of Alabama have been conspicuously solicitous in their regard for the right of

defendants charged with serious crimes to be tried according to the evidence alone. On innumerable occasions they have reversed convictions as perhaps growing out of improper appeals to passion and prejudice.

One of the leading cases reaching this result is *Tannehill* v. *State,* 159 Ala. 51. A Negro defendant sought by Negro witnesses to prove an alibi. The Solicitor pointed out that the alibi was set up "by a lot of Negro witnesses." He emphasized in his argument that Negroes would stick to each other and would perjure themselves to come to the aid of one of their people. In reversing the conviction for murder Judge Simpson of this Court said:

> "It is the duty of the Court to see that defendant is tried according to the law and the evidence free from any appeal to prejudice or other improper motive, and this duty is emphasized when a colored man is placed upon trial before a jury of white men. Courts in some other jurisdictions have held, on what seems to be good reason, that the injury done by such remarks cannot even be atoned by the retraction or the ruling out of the remarks."

A few years later a conviction was reversed because the Solicitor had argued that "if that Negro was taken out of Court there would not be much left." See *James* v. *State* 170 Ala. 72.

And perhaps the most frequently cited case on the subject is *Moulton* v. *State,* 199 Ala. 411. A Negro was convicted for the murder of a white man and the Solicitor argued, "If you do not hang this Negro, you will have a similar crime in

this country in six months." He said also: "Unless you hang this Negro our white people living out in the country won't be safe; to let such crimes go unpunished will cause riots in our land." The conviction was reversed, although the Trial Judge had sustained an objection to the last of the two remarks and had excluded from the consideration of the jury remarks about white and black races. After pointing out that the general atmosphere of the case required a summation free from prejudicial remarks and emphasizing the fact that there was evidence more favorable to the defendant than the jury's verdict seemed to have taken into account, this Court said:

> "Considering the general conditions surrounding the trial, all of which had before that appeared in this cause, and the menace of it all to a calm and dispassionate application of a just and humane law, the Court is of opinion that the matter here brought in to review involved an appeal to race prejudice, and should have been so recognized and treated at the time of the ruling upon it."

The Court pointed out further that a general statement by the Trial Judge in his charge did not constitute a sufficient cure for error of this sort.

In another case, *Johnson* v. *State,* 212 Ala. 464, in which the question did not need to be decided, this Court, by Judge Gardner, went out of its way to say:

> "It may not be amiss to suggest, however, that particularly in trials of this character, the Solicitor in argument should be careful to refrain from any remarks calculated to

> arouse race prejudice, or other remarks as to local conditions, not shown by the proof or that could not properly be so shown."

See also *Richardson* v. *State,* 204 Ala. 124, in which a conviction was reversed, because the Solicitor had argued that in many cases he had heard "hip pocket defenses", and *Bridges* v. *State,* 225 Ala. 81, in which a reversal was ordered because the Solicitor argued that after the crime had been committed "they wanted to take the life of the man who threw that bomb." Judge Knight of this Court said:

> "This was a direct appeal to passion and not to reason. Its only tendency was to inflame the minds of the jury. Immediate repressive measure should have been resorted to by the Court. The prejudicial effect of such argument was well-nigh ineradicable.
>
> Prosecuting attorneys in their zeal to vindicate the law, should not allow the excitement of the occasion, nor the exhilaration incident to success in any case to lead them in their argument to the jury beyond the domain of legitimate or permissible forensic efforts."

Well do these words apply to the case at bar.

The same rule as this has been universally followed in the Court of Appeals. See *Chambers* v. *State,* 17 Ala. App. 178; *Perdue* v. *State,* 17 Ala. App. 500; *Jones* v. *State,* 21 Ala. App. 234; *Fisher* v. *State,* 23 Ala. App. 544; *Black* v. *State,* 23 Ala. App. 549, and *Williams* v. *State,* 25 Ala. App. 342.

In *Taylor* v. *State,* 22 Ala. App. 428, a case which did not involve race prejudice, the conviction was reversed because the Solicitor said that

the case would have been nol prossed had he not thought it a good case. Presiding Judge Bricken said:

> "The office of Solicitor is of the highest importance, he is the representative of the State, and as a result of the important functions devolving upon him as such officer necessarily holds and wields great power and influence, and as a consequence erroneous insistences and prejudicial conduct on his part tend to unduly prejudice and bias the jury against the defendant; this, without reference to the instructions of the Court. The test in matters of this kind is not necessarily that the conduct of the Solicitor complained of did have such effect upon the jury, but might it have done so?"

And he said also:

> "But however guilty the defendant may appear to be from the evidence, he is nevertheless entitled to a fair and impartial trial, and before a judgment of conviction can be permitted to stand, upon appeal, it must affirmatively appear that the trial below proceeded throughout without prejudicial and substantial error."

It is submitted that the case at bar falls well within these emphatic declarations made over a long period of time and in cases involving a great variety of circumstances by both appellate Courts of this State. The Court below should have excluded the improper argument of the Attorney General and its failure to do so is reversible error.

POINT X.

The Court erred in the Patterson case in denying the defense an overnight adjournment.

On the afternoon of Wednesday, November 29th, and before the defense rested, counsel requested an adjournment until the following morning in order to permit the taking of the testimony of an expert witness, Dr. Reisman, and to await the arrival of the deposition of Ruby Bates. The testimony of the doctor was material in order to show that the semen in the body of Victoria Price was not the result of a recent intercourse because the germs were dead, and also that the presence of semen might be due to an act committed within thirty-six hours prior to its finding. Dr. Reisman had testified on this subject at the trial before Judge Horton. At this trial the nature of his previous testimony was called to the Court's attention (transcript, p. 763).

The materiality of Ruby Bates's testimony is, of course, not open to dispute. She was one of the two persons alleged to have been attacked. She had testified before Judge Horton that no raping had taken place and had repeated this testimony in the deposition read in the evidence at the Norris trial (Norris transcript, p. 585 and following).

When Dr. Reisman's absence was first called to his attention the Trial Court stated that he would permit Dr. Reisman's examination out of order but refused to grant an overnight adjournment (transcript, p. 722). Subsequently, when the testimony was all in, the Court took a brief recess to await the arrival of the doctor (transcript, p. 728), but an adjournment was again

refused and exception noted (transcript, p. 764). About ten minutes after the beginning of the summations Dr. Reisman arrived in Court. A request that the case be re-opened so that his testimony might now be taken was refused; and the Court even refused to permit counsel to make a record of the doctor's arrival and of his request, thus preventing the noting of an exception to the Court's refusal (transcript, p. 764).

Before the conclusion of the testimony defendant's counsel called the Court's attention to the fact that Ruby Bates's deposition was on its way, it having been mailed from New York by air mail that day, according to a telegram read into the record (see transcript, p. 728). Counsel requested an adjournment until the following morning so that this evidence might go before the jury (transcript, p. 724). The request was overruled by the Court and exception noted (transcript, p. 725). At the very commencement of the trial an exception had been noted to the Court's refusal of a similar adjournment (transcript, p. 498).

As a matter of fact the deposition was returned by nine o'clock on the following morning, Thursday, November 30th. Its arrival was called to the Court's attention but it refused to permit the summations to be suspended so that the document might be read to the jury (transcript, p. 766).

It is true that the question of adjournment lies within the discretion of the Trial Court. So, in *Williams* v. *State*, 224 Ala. 6, the refusal of an adjournment was held not to be reversible error where there was no proof that the absent witness was within the jurisdiction of the Court; and in *Bridges* v. *State*, 225 Ala. 81, it was held no abuse of discretion where counsel did not state to the Court what the witness would testify to. In *Bell*

v. *State*, 227 Ala. 254, the Court refused to reverse where counsel had had a week in which to obtain a subpoena for a witness but did not do so until the very last day. However, in *City of Birmingham* v. *Goolsby*, 227 Ala. 421, a judgment was reversed where the Court refused an adjournment until counsel could finish a case then on trial.

In the case at bar it appeared that Dr. Reisman was actually on his way to the court and was momentarily expected at the time when the evidence was closed. The nature of his testimony was well-known to the Court and was called to the Court's attention. The nature of Ruby Bates' testimony was also well known to the Court and the deposition also shown to be on its way. In view of the fact that the taking of the testimony was not concluded until about 3:30 in the afternoon and that the defense desired an adjournment merely until the next morning, no reasonable considerations could be said to have prompted the Court in denying the adjournment. There had been no attempt by the defense to delay these cases. Long sessions had been held on each of the preceding two days. The refusal of an adjournment under circumstances such as these was certainly not the exercise of a reasonable discretion. On the contrary, it was an arbitrary act, the sole motive of which must have been to restrict the proof of the defense.

Further light on the Court's motives is shed by what happened in the Norris case. In that case Luther Morris, one of the State's witnesses, was not available when the trial opened (Norris transcript, p. 512). When the State's case was concluded Morris had not yet arrived and the Court then, over the objection and exception of defend-

ants' counsel, granted an adjournment in the early afternoon even though defendants' counsel specifically called the Court's attention to its refusal to give a similar overnight adjournment in the Patterson case (Norris transcript, p. 513). Apparently, therefore, where it was helpful to the prosecution the Court was willing to grant delay; not so when it might be helpful to the defense.

Even had the Court been motivated only by the desire to bring these trials to a speedy conclusion this was no occasion for such an effort. Speed at the sacrifice of a substantial right is an abuse of power. In this case it constituted error so prejudicial to the defense as to require a reversal.

POINT XI.

The Court erred in its charges to the jury.

A. *The Patterson Case.*

In the Patterson case the only exception taken to the Judge's charge was a general one (transcript, p. 747). Specific exceptions were not taken on account of counsel's misapprehension of the applicable rule. Appellant recognizes that under well-settled law a general exception permits the review of the charge only if it is objectionable as a whole. It is submitted, however, that a reading of this charge in its entirety shows it to be so prejudicial to the rights of defendant as to make the general exception sufficient.

In this connection the Court's attention is called to *Railroad Company* v. *Reeves*, 10 Wall. 176; *Arkebaur* v. *Falkenzinc Company*, 178 Ark. 943 and *Snyder* v. *Viola Mining Company*, 3 Idaho

28. These cases lay down the rule that where the tenure of the charge as a whole is so erroneous that it could hardly be corrected had attention been called to specific items the Court will review the charge on a general exception.

It should be remember that there were only two issues in this case, first, whether any crime had been committed at all and second, whether the defendant was one of the persons who committed it. There was no issue of consent, no claim that defendant had not used the force required by the law, merely a claim that defendant had had nothing whatever to do with the alleged crime at all. Nevertheless at the very commencement of its charge the Court unnecessarily dwelt at some length on the subject of force and consent (see transcript, pp. 731, 732). While indeed recognizing that the defense made no claim that there was a question of consent (transcript, p. 733) the Court nevertheless went out of its way to state:

> "Where a woman charged to have been raped, as in this case, is a white woman, there is a very strong presumption, under the law that she will not and did not yield voluntarily to intercourse with the defendant, a negro, and this is true whatever station in life the prosecutrix may occupy, whether she be the most despised, abandoned or ignorant woman of the community, or a spotless virgin, or a daughter of a home of luxury and learning" (transcript, p. 733).

The only possible object in making these remarks to the jurors was to prejudice them against the defendant. This was an appeal to race prejudice, as would appear from the fact that when the

Court in its charge in the Norris case omitted a similar statement it remarked: "And I am not raising the color line there" (Norris transcript, p. 628).

The Court next charged the jury on the subject of aiding and abetting (transcript, p. 733). This, it is submitted, was also irrelevant to the case. The contention of the prosecutrix was that the defendant had raped her. There was no claim that he was merely a bystander, and it was entirely irrelevant to submit any such issue to the jury. In the same way the Court charged on the subject of conspiracy (transcript, p. 734) which was also entirely irrelevant to this case.

The Court made a very inadequate statement of the fair trial to which defendant is guaranteed under the Constitution, by likening his right to such fair trial to the protection given by the woman against rape. The Court said: "He, like the woman I referred to, has guaranteed to him by the Constitution of the State of Alabama and the United States, that he will receive such consideration" (transcript, p. 735). The right of a defendant to a fair trial stands on much higher ground than does even the right of a woman not to be raped. The one is a matter of constitutional protection; the other merely a matter of statutory provision. There was no occasion, in explaining to the jury what rights the defendant had, again to bring the prosecutrix into the case.

After some further irrelevant discussion of circumstantial evidence (transcript, pp. 736, 737), the Court gave a detailed analysis of the state's case. It referred to the fact that there were two witnesses for the state who, it claimed, showed that Victoria Price was raped and also that there was corroboration, specifically stating to the jury

that the state contended Victoria Price had been corroborated by Gilley, by the statement of Ruby Bates when taken off the train "making complaint that they had been attacked," and by evidence showing a fight had occurred (transcript, p. 738). Particularly offensive is the reference to the statement of Ruby Bates because there was no evidence whatever that the girl said she had been "attacked." The affirmative answer given by the station agent, Hill, to the objectionable leading question merely indicated that Ruby Bates had fallen in with his suggestion, that she had made a complaint as to her treatment (transcript, p. 561). What the nature of that complaint was did not appear. The Court had no right to suggest to the jury that it was a complaint of attack.

The Court went on to point out that the state claimed Victoria Price had been corroborated by the testimony of witnesses who saw the scuffle on the train and the persons thrown off. And finally, as already noted, the Court pointed out that the finding of semen in Victoria Price's vagina and on other parts of her body constituted items of corroboration on which the prosecutrix might rely (transcript, p. 739). In all this long analysis of the claims of the state, the defendant's contentions were referred to only once, and then only in respect to their least important item, the fight. The Court pointed out that the defendant admitted the fight and that he contended that it constituted no part of the rape (transcript, p. 739). All defendant's contentions regarding the other alleged corroborations are wholly ignored; and nowhere in the entire charge is any statement made at all of his main contention.

Particularly objectionable also was the Court's comment on the defense's failure to explain the

semen. After pointing out that the presence of the semen was subject to explanation (which portion of the charge has already been quoted under Point VII) the Court said:

> "No mere suspicion, without evidence, that it could have been some other time or by some one else is a sufficient answer or explanation. Mark you, gentlemen, I am continually cautioning you that you have a right to look to the evidence in the case, and nothing but the evidence, but it is your right, and your sworn duty, as jurors, to consider what reasonable conclusions may be drawn from the evidence. Gentlemen, at this point, I desire to say to you that during the progress of this trial wherever the court sustained an objection to any question asked by either side in this case, that ended the matter. You, of course, have responsibilities, but you do not have any responsibility on the questions of law, and when the court rules on a question and said that question was not to be answered, that ended it so far as you are concerned, and it makes no difference to you whether the court is right or wrong, fair or unfair, you have no right or authority to supervise and review the rulings of the Court. When you assume to do it, you violate your oath and step outside of your power and authority, and comments on the rulings of the court that were adverse to counsel is not to be considered by you in a case, and if you do consider such comments you have violated your oath. There is just common sense and reason in that. If a case is not to be tried under the rulings and direction of the court, then, gentlemen of the jury,

when the court says a question shall not be answered, if that is to be used as legitimate argument, to speculate on what the answer would be, then the party has gotten as much benefit from an adverse ruling as he would have gotten from a favorable ruling, and the whole action of the court would be nullified, and evidence that the court declared improper would go before the jury. If that is to be the law, then we could have no law" (transcript, pp. 740, 741).

Another portion of the charge highly prejudicial to the defendant was that which dealt with the credibility of witnesses. The Court intimated to the jury that the sole way to attack credibility was to bring a neighbor or acquaintance into Court to testify about a witness' reputation (transcript, p. 743). This was a culpably misleading charge, bound to affect the defendant adversely, for it left the jury with the impression Victoria Price's credibility had not been attacked since no one from her own neighborhood had been brought to testify regarding her reputation. As will be pointed out hereafter, and particularly in discussing this charge in the Norris case, there are many ways of attacking credibility besides using the testimony of acquaintances and these should have been called to the jury's attention

While the effect of the charge was somewhat modified by the Judge's subsequent remarks, these were neither sufficient nor complete, particularly in this respect, that the Judge did not instruct the jury that it might disregard the entire testimony of a witness found wilfully to have testified falsely on a material point. The law governing this situation will also be discussed hereafter.

In emphasizing the fact that the defendant was an interested witness (transcript, p. 745) and failing to point out that the prosecutrix was also an interested witness, the Court showed its partiality.

We have already shown that the Judge concluded his charge without giving instructions as to the form of verdict to be brought in by the jury in case of an acquittal (transcript, p. 779).

It is now respectfully submitted that a reading of this charge, having due regard to the atmosphere of the case and the remarks constantly made by the Court throughout the trial, necessitates the conclusion that the charge was improper. No case has been found exactly like this one; but it is fundamental law that a charge should be impartial and avoid giving any indication to the jury of the Court's own view. That cannot be said of this charge. Therefore, a general exception to it was sufficient.

B. *In the Norris Case.*

A number of specific exceptions were taken to the charge in this case. Two of these will be dealt with.

1. Counsel excepted to the portion of the charge where the Court stated: "That the mere presence renders one guilty as well as he who committed the crime" (transcript, p. 639). In an answer to the exception the Court said: "I said that if his presence was known to the party committing the act, and his presence encouraged the commission of the act, he would be guilty." To this amplification of the charge exception was taken (transcript, p. 640).

It is submitted that this statement of the Court was an improper statement of the law because it

permitted the jury to find defendant guilty of aiding and abetting regardless of his intent. Unless defendant was present *intending* to assist in the commission of the crime he cannot be held guilty. In *Raiford* v. *State*, 59 Ala. 106, this Court quoted with approval from 1 Wharton Criminal Law, Section 211, as follows:

> "Something must be shown in the conduct of the bystander which indicates a design to encourage, incite, or, in some manner afford aid or consent to the particular act; though when the bystander is a friend of the perpetrator and *knows* that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone will be regarded as an encouragement."

See also *State ex rel. Attorney General* v. *Tally*, 102 Ala. 25, in which the Court ruled that in order to hold a defendant as an abettor it must be found that he was present "for the purpose of assistance and with the intent to assist if necessary." The same rule was laid down in *Morris* v. *State*, 146 Ala. 66 and *Jones* v. *State*, 174 Ala. 53. See also *Hicks* v. *United States*, 150 U. S. 422.

It is, therefore, submitted that the Court's amplified charge on this subject was incorrect and was bound to have a misleading effect upon the jury.

2. The second exception arose in connection with the Court's charge on the subject of credibility. The Court had charged "Well, his character cannot be assailed in any other way than I have mentioned, that is, bring in evidence to prove what sort of man he is in the community; what he is reputed to be" (transcript, p. 636). The Court then went on to charge that when a witness had contradicted himself purposely, the

jury was not required to disregard the whole of his testimony, but that it was its duty to receive those parts of it which it believed to be true (transcript, p. 637). There was nothing in the charge which advised the jury that if it so desired it might disregard entirely all the testimony of a witness who had wilfully testified falsely regarding a material fact.

Counsel excepted to the charges just quoted and requested the Court to charge "That if any witness wilfully testifies falsely as to a material fact in this case, the jury is at liberty to disregard his or her entire testimony if they see fit" but the Court refused to make this charge (transcript, p. 640). It is submitted that the Court's charge with respect to credibility was misleading and improper and that the Court should have charged as requested by the defendant's counsel. While proof of reputation for untruthfulness is undoubtedly one of the ways in which to impeach a witness it is by no means the only way and it was misleading to suggest to the jury in this case that it was. As has already been noted, a witness may be impeached by proof of a crime involving moral turpitude. (See Code, Sections 7722 and 7723 discussed in Point VI, supra). And it is well settled that if a witness has wilfully testified falsely on a material issue, or given testimony at one trial different from his testimony at another, the jury may determine that the witness is unworthy of belief. As was said by Chief Judge Brickell in *Burton* v. *State*, 115 Ala. 1:

> "The credit of a witness may be impeached by showing that on some former occasion he has made statements inconsistent with his testimony upon the trial."

See also *McClellan* v. *State,* 117 Ala. 140 and *Seawright* v. *State,* 160 Ala. 33.

In *Harris* v. *State,* 96 Ala. 24, it was held error to refuse to charge that prior inconsistent statements by a witness could be looked to as tending to impeach; and in *Williams* v. *State,* 114 Ala. 19, it was likewise held error to refuse a request that proof of contradictory statements on a material point was sufficient to raise a reasonable doubt regarding the truth of the witness' testimony.

In *Carpenter* v. *State,* 193 Ala. 51, a charge was upheld which permited the jury to disregard part of or all of the testimony of any witnesses who had wilfully testified falsely as to a material fact. See to the same effect *Alabama Great Southern Railroad Company* v. *Frazier,* 93 Ala. 45 and *Francher* v. *State,* 217 Ala. 700. The rule was recognized as follows by this Court in *Spring Park Association* v. *Rosedale Park Amusement Company,* 216 Ala. 549: "If such witness swore a wilful falsity as to a material fact * * * it was open to the Trial Court to find and believe that the testimony of such witness as to other material facts is not worthy of credence."

And in *Roberts* v. *State,* 122 Ala. 47, a conviction for rape was reversed for the single error committed by the Trial Court of refusing to charge that, in weighing the testimony of the prosecutrix, the jury might consider the fact that she had changed her testimony in a single particular.

It is thus apparent that this Court has consistently laid down the rule that material contradictions or the giving of wilfully false testimony discredit a witness. The jury in the case at bar was not, therefore, properly instructed on this subject and the exceptions taken are sufficient.

POINT XII.

With reference to errors committed on the admission of evidence.

There are certain isolated matters in these cases which require brief consideration.

1. In the Patterson case Hill was permitted, over objection and exception, to answer the following question: "Did you hear these women, either one or both, make any complaint as to their treatment on that train?" (transcript, p. 561). This, it is submitted, was wholly improper, particularly as the answer showed that no complaint had been made by the prosecutrix but only by Ruby Bates and as no attempt was made to find out the nature of the complaint. In other words, the prosecuting attorney was able to get before the jury an inference that a complaint of raping had been made when such was not the fact, by putting a leading question and then leaving to the defense the responsibility of investigating the matter further. The defense should not have been subjected to any such burden. If the question of a complaint was at all relevant the witness should have been asked the simple question what was said and who said it. The defense would then have been in a position to prevent an answer since nothing had been said by Victoria Price. Even at the trial before Judge Horton this evidence was not permitted, except in an attempt to contradict Ruby Bates. There was no justification whatsoever for it in the case at bar.

2. In the Patterson case the defendant was cross-examined with reference to testimony he had given at Scottsboro. His counsel objected on

the ground that the trial at Scottsboro was null and void because defendants had not had proper representation there by counsel and that it was, therefore, improper to cross-examine the defendant on statements there made (transcript, pp. 630, 631). Objection was overruled and exception taken. In view of the fact that defendant did not have proper representation at Scottsboro, it is submitted that nothing which he said on that occasion can properly be used in evidence against him. It will be remembered that at Scottsboro defendant had admitted during his cross examination having seen some raping and then denied it (Patterson Scottsboro transcript, pp. 51-56). The Court permitted the Attorney General on cross examination to bring out the unfavorable testimony (transcript, pp. 631-635). The Court, however, refused to permit counsel to ask the witness whether he had not at Scottsboro also testified that he had seen no girls on the train at all (transcript, pp. 638-641). The net result of this episode was not only to give the jury the impression that defendant had made a confession at the Scottsboro trial but also to deprive him of the opportunity of making explanation.

3. In the Norris case Deputy Sheriff Simmons was permitted to testify about a statement made by the defendant in jail shortly after his arrest. The question was put: "Did anybody ask him whether or not he had committed any offense?" After it had been answered by the witness' statement that the defendant had denied having raped anyone (transcript, p. 555), the prosecution asked: "Did he say that the others had committed rape?" Counsel for the defense objected to that question (transcript, p. 556), on the ground that since defendant had denied

his own guilt, any other statements he made were immaterial and irrelevant. Objection was overruled and exception taken (transcript, p. 557). The answer of the witness was that Norris had said the rest of the boys were guilty (transcript, p. 557). It is, of course, obvious that such an answer was bound to have a prejudicial effect upon the case of the defendant. It was wholly irrelevant to any issue before the Court. It might have been competent to show that defendant had confessed his own guilt if the proper foundation for such statement had been laid, but as the witness admitted that defendant had not confessed his own guilt it is inconceivable upon what theory the defendant's charges against his co-defendants were admissible, unless it was to prejudice defendant in the eyes of the jury.

POINT XIII.

The Court erred in striking the motions for a new trial made in each of these cases.

In the Patterson case the jury's verdict was rendered on December 1, 1933. At that time defendant's counsel asked the Court for time in which to file a motion for a new trial after the receipt of the stenographer's minutes. The request was denied, the Court stating to counsel in open court in the presence of the Solicitor for the State, that counsel had thirty days in which to make the motion and that a continuance of the motion could be had if the minutes were not ready in time to permit amendments (Patterson transcript, p. 32). A motion for a new trial was filed on December 29, 1933 (Patterson transcript, p. 23) and called to the Court's attention by tele-

gram on December 28, 1933, with the request for a continuance (transcript, p. 766).

A similar application was made after the jury brought in a verdict in the Norris case (Norris transcript, p. 34). A motion for a new trial was filed on January 2, 1934 (Norris transcript, p. 23) which was called to the Court's attention by telegraph on that day with the request for a continuance (Norris transcript, p. 654).

On December 29, 1933 the Court notified counsel that a continuance had been granted to January 26th, 1934 in the Patterson case (Patterson transcript, p. 766) and on January 4, 1934 that a continuance would be granted to the 27th of January, 1934 in the Norris case (Norris transcript, p. 654). On January 10th counsel wrote to the Court in both cases advising that the minutes had not yet been received and asking for a further continuance for the purpose of making amendments. The Court suggested alternative dates and the date of February 24th was finally selected by counsel and the matters adjourned until that date (Patterson transcript, p. 766; Norris transcript, p. 654). Copy of the motion for new trial had in the meantime been served on the Attorney General for the State of Alabama, acting as Solicitor for the State in each of these cases, and had been retained by him without objection (Patterson transcript, p. 767; Norris transcript, p. 654).

On February 24, 1934, counsel having proceeded to Decatur to argue the motions for a new trial they were confronted for the first time with a contention that the motions had not been filed within the time allowed by law. The Attorney General filed a motion to strike the motions for new trial on the specific ground that they should have

been filed within the term which expired on December 23d, 1933 (Patterson transcript, p. 24; Norris transcript, p. 24). The Court, after hearing argument, granted the State's motion to strike, to which action exception was duly taken in each case (Patterson transcript, pp. 25, 784; Norris transcript, p. 25). On the argument of this motion in the Court below, the Solicitor for the State cited the case of *Morris* v. *Corona Coal Company*, 215 Ala. 47, in support of his application. This Court in that case construed Section 6670 as requiring a motion for a new trial to be made within the term of Court even though the thirty days mentioned in the statute had not yet run. No case has been found, however, in which this Court has so applied the rule against a defendant in a criminal case.

No such rule exists as to equity decrees, this Court having held that Section 6636, which provides that Chancery Court shall always be open, deprives the ending of a term of any particular significance as to such courts. See *Ex Parte Howard*, 225 Ala. 106.

Some suggestion was made in the argument below that the error, if there was one, was jurisdictional and could not be waived. Such, however, is not the law. This Court held in *Greer* v. *Heyer*, 216 Ala. 229, that a waiver might be implied from the circumstances.

Under the peculiar circumstances existing in these cases appellants respectfully submit that there was no justification for the striking of their motions for a new trial. That defendants intended to file motions for new trial was known both to the Court and to the State Solicitor. Even though it may not be a strictly legal excuse that defendants' counsel relied on the statement of the

Court that thirty days were available for the purpose of filing it is submitted that the State is estopped from making the motion to strike by its silence maintained while knowing that counsel did so rely. Furthermore, regardless of the question of reliance, it is also submitted that the State is estopped in its acquiescing in the adjournments granted by the Court and by its permitting counsel to come to Decatur to argue the motions without at any time raising the point that the motions had been filed too late.

The Court below should, therefore, have considered the motions on the merits and should have passed on defendants' contentions that the verdicts were against the weight of the evidence. The Court below having failed to do this it is respectfully submitted that this Court is bound to consider the question. Since the evidence has already been reviewed at some length it will be but briefly summarized at this point.

Victoria Price claims that while she and Ruby Bates were travelling alone they were joined by some white boys, that tewelve Negroes put off all but one of the white boys, and then proceeded to rape them. She claims that these Negroes had two pistols and knives, that she was hit by almost all of them and bruised all over her body so that her head was cut, her face swollen and marks showed on the rest of her, and that semen was on her body and on her clothes. Nine Negroes were arrested and no pistols found, only one knife. No marks of semen were found on the clothes of the boys. No one noticed any semen on Victoria Price's clothes nor any bruises on her face. There is no evidence that she made any complaint at Paint Rock or that Gilley, the white boy, who had

remained on the train, made any complaint. On the contrary, he ran away from the girls and paid them no attention and sought to obtain no assistance for them. The doctor who examined Victoria Price almost immediately found no semen on her body or her clothes and found none of the marks on her body which she testified were there. All he found were some slight scratches on her wrist and one or two minute bruises on the small of her back. It cannot be disputed that had she been thrown down on broken stone as she claimed and raped by six Negroes while resisting and while lying on this broken stone her body would have shown some marks of the encounter.

Victoria Price's claim that she was riding in the last of the gondolas and that she got out of this car at Paint Rock and fell in a faint is disputed by the testimony of everyone else who observed the events at Paint Rock. She was seen standing on the ground by a number of witnesses at a point far to the front from that where she claimed she got out of the gondola. To have reached that point she must have run along the tracks and this she was seen doing by the witness who had the best opportunity of observation.

Gilley, who purports to corroborate her as to the raping, a witness who testified at only one of the other trials and then did not testify to any raping, was a witness in whom no credence could be placed. His admitted failure to get help while the alleged raping was going on and his running away from the girls when the train reached Paint Rock stamp the rest of his testimony as wholly incredible.

At every point where Victoria Price's story is subject to independent verification it has been

proven false. Gilley as well as Carter contradicted her claim that she and Ruby Bates had been travelling alone. Significant is also the fact that Victoria Price claims that all the Negroes who had been arrested had taken part in the fight whereas two of them were clearly incapable of having climbed over the moving freight cars. Mrs. Price's readiness to testify to things which she knew nothing about is illustrated by her acceptance of other people's suggestions in connection with the calibre of the pistols, a statement not repeated when she knew she would be subject to severe cross examination. Indeed throughout these trials this witness has made and withdrawn statements in a manner which can only be characterized as reckless. A conviction based on testimony such as this cannot be allowed to stand.

CONCLUSION.

The Trial Court in these cases instead of giving the defense every opportunity of establishing the weakness of the prosecution improperly interfered with the cross examination of the prosecutrix and made its hostility to the defense known to the jury by numerous prejudicial remarks. Errors were committed in both the reception and the exclusion of evidence. In both cases the Court's charge failed to meet the high degree of impartiality required by law and in the Norris case included specific errors, properly excepted to. In addition, the rights of these defendants under the Fourteenth Amendment to the Constitution of the United States were violated and their rights to a fair trial under the Constitution of the State of Alabama denied them.

English-American law has justly prided itself on having built up, in its criminal branch, a system which affords to the accused greater protection than he has perhaps ever received under any other legal system. That protection has been extended regardless of the character or standing of the accused, regardless of the character of the crime or the position of the individual wronged. It is true that there have been times when passion and prejudice have swayed reason and made way for injustice. No community has been immune from such instances. It is the privilege of the Trial Court, after the heat of the trial itself has passed away, to scrutinize the evidence and its own rulings and to endeavor to undo such errors as may have been committed in the hurry and passion of the moment. By the courageous exercise of this function a Trial Court can prevent dishonor to the community and uphold the noble traditions of our governmental system; and where the Trial Court not only has failed in the performance of that duty but has by its own conduct contributed to securing a conviction, the Appellate Court is vested with the duty and responsibility of reversing the conviction so obtained. These cases, we respectfully submit, since the contentions of the prosecution cannot bear the scrutiny of cold reason, constitute a fitting occasion for the exercise of that power.

In times to come, when the individual participants in this long litigation will have been forgotten, let it be remembered that our Courts were able to break through the barriers of local and

racial prejudice and do that justice without which our community cannot endure.

Respectfully submitted,

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