

CRIMINAL EVIDENCE.

not have been conclusive against the prisoner.

In *State v. Graham*, 74 N. C. 646 ; S. C., 21 Am. Rep. 493, an officer, who had arrested a person charged with larceny, compelled him to put his foot in a track found near where the larceny was committed, and testified as to the result of the comparison. *Held*, no error. The court say, "no hopes or fears of the prisoner could produce the resemblance of his track to that found in the corn-field." They instance the case of a fragment of a knife-blade found sticking in a window, and its correspondence with the blade of a knife found in a prisoner's pocket ; the similar case of gun-wadding found in a wound, and evidently torn from paper in a prisoner's pocket ; the correspondence of marks on a prisoner's face with the wards of a key with which he was struck at the time of the commission of the offence ; and ask : "If an officer arresting one charged with an offence had no right to make the prisoner show the contents of his pocket, how could the broken knife, or the fragment of paper corresponding with the wadding, have been found. If when a prisoner is arrested for passing counterfeit money, the contents of his pocket are sacred from search, how can it ever appear whether or not he has on his person a large number of similar bills, which, if proved, is certainly evidence of the *scienter* ? If an officer sees a pistol projecting from the pocket of a prisoner arrested for a fresh murder, may he not take out the pistol against the prisoner's consent, to see whether it appears to have been recently discharged ?" They then instance a veil and a mask. This is fairly the substance of the opinion, and we have already sufficiently commented on this line of argument.

In *State v. Garrett*, 71 N. C. 85 ; S. C., 17 Am. Rep. 1, at a coroner's inquest, upon the body of a person found dead, it was proved that defendant had said that deceased was accidentally burned to death, and that defendant had burned her own hand in trying to put the fire out. Defendant being then in custody on suspicion of having murdered the deceased, was ordered by the coroner to show her hand, which she did, and it

appeared uninjured. *Held*, that evidence of such fact was admissible upon the trial of defendant for murder. This might be classed with the mask and veil as an instance of an attempt to conceal evidence ordinarily visible. The jury, of course, have a right to scrutinize patent facts, such as stature, shape, complexion, hair, features, scars, loss or peculiarity of members, etc. These are public matters, which the public cannot be prevented from viewing, and which the prisoner knows are liable to comment and comparison. Of these, witnesses who observed them may speak, or the jury may look at them in court. So if witnesses have observed the patent characteristics of gait and voice, they may testify to them, or the jury may observe the prisoner's gait as he voluntarily and naturally walks, or his voice as he voluntarily speaks. But will it be contended, that on a question of resemblance of gait, the court can compel the prisoner to get up and walk, or that on a question of voice, they can compel him to speak ?

The foregoing are the only cases holding this doctrine. On the other hand is *Stokes v. State*, 5 Baxt. 619 ; S. C., 30 Am. Rep. 72. On an accusation of murder, it being claimed that certain footprints were those of the prisoner, the prosecuting attorney brought a pan of mud into court, and placed it in front of the jury, and having proved that the mud in the pan was about as soft as that where the tracks were found, called on the prisoner to put his foot in the mud in the pan. On objection, the court instructed the prisoner that it was optional with him whether he would comply. The prisoner refused, and the court instructed the jury that his refusal was not to be taken against him. The prisoner being convicted, *held*, that he was entitled to a new trial. It is impossible to distinguish this case. If the court had considered the evidence competent, it would have compelled the prisoner to "make tracks," or instructed the jury that his refusal might be considered against him. The court said : "In the presence of the jury the prisoner is asked to make evidence against himself." That is exactly what he was asked to do in the tattoo case, and what he was