And no process can issue for any thing merely due to the plaintiff's attorney after the claim of the plaintiff is legally at an end. The defendant is, therefore, entitled to be discharged.

Best J. concurred.

Rule absolute.

THE KING *against* THE INHABITANTS OF MACHYNLLETH AND PENEGOES. Wednesday, May 23d, 1821. The Court of Quarter Session cannot impose more than one fine for the non-repair of a bridge.

The following order of sessions of the county of Montgomery was removed by certiorari into this Court. "It is ordered, that the fine heretofore imposed by the Court on the inhabitants of the township of Machynlleth **[470]** and the parish of Penegoes, for not repairing Pontfelingerrig Bridge, be, and the same is hereby increased by the sum of 200l." Taunton obtained a rule nisi for quashing the order. It appeared from the affidavits that the defendants had been presented at the January Sessions, 1818, for the non-repair of the bridge in question; to which presentment, they, at the same sessions, submitted, and a fine of 300l. was imposed and afterwards levied upon them. At the last Michaelmas session 1820, the fine not having been sufficient, the order in question was made, imposing a second fine of 200l. The Court, after hearing Campbell in support of the order of sessions, were of opinion, that the power of the sessions was at an end after the first fine, and that they had no jurisdiction to impose a second, and they referred to *Rex* v. *Inhabitants of Old Malton* (*a*) as an authority directly in point.

Order of sessions quashed.

[471] THE KING *against* EDMONDS AND OTHERS. Thursday, May 24th, 1821. No challenge can be taken either to the array or to the polls, until a full jury have appeared; and therefore, where the challenges are taken previously, they are irregularly made. The dissallowing of a challenge is not a ground for a new trial, but for a venire de novo; and every challenge must be propounded in such a way as that it may be put at the time upon the Nisi Prius Record, so that the adverse party may either demur, or counterplead, or deny the matter of challenge, in which last case only triers are to be appointed; and therefore, where the challenges were not put on the record, the defendants were held not to be in a condition to ask the opinion of this Court, as a matter of right, upon their sufficiency. There can be no challenge to the array on the ground of unindifferency in the Master of the Crown Office, he being the officer of the Court expressly appointed to nominate the jury. The only remedy in such a case is to apply to the Court by motion to appoint some other officer to nominate the jury. The

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(*a*) Holroyd J. read the following MS. note of the case.

The King against *The Inhabitants of the Parish of Old Malton.* Yorkshire Summer Assizes, 9th August, 1794. Cor. Lawrence J.

This was an indictment for not repairing a highway. The defendants had submitted to a fine, which had been apportioned between the parishioners and the trustees of the turnpike (the road indicted being turnpike), pursuant to the power given by the General Turnpike Act. Holroyd applied for a further fine, the whole fine being laid out on the way, and the way being still out of repair. Lawrence J. doubted his power to give any further fine, on the ground that the Court had given their judgment; and though Salk. 358, (see S. C. 6 Mod. 163) states that the judgment is not at an end by the defendants' coming in and submitting to a fine, and that if the road is not put in repair, writs of distringas shall issue against the defendants till the road is completed: he held, that those writs are now the only remedy on the present indictment; that the fine is the punishment for the neglect and offence of which the defendants are indicted; and though the Court may compel an actual repair, yet the punishment has been inflicted, and they cannot inflict a further punishment or fine; that the parish may be again indicted, and a fine imposed and apportioned on such indictment. Vide also 1 Hawk. c. 76, s. 94.

Master of the Crown Office, in nominating the jury, selected the names of the jurors, and did not take them by chance from the freeholders' book. He also took those only whose names had the addition of "esquire" or of some higher degree; and included some persons who were in the commission of the peace: Held, that in so doing he was perfectly right. He also included in his nomination some persons, who, as grand jurymen, had found the indictment, and persisted in his opinion as to their sufficiency, unless the Crown would consent to abandon them, which was done, and others were then substituted in their places: Held, that he was wrong in his opinion, but that there was no ground for presuming partiality. The sheriff's officer had neglected to summon one of the 24 special jurymen returned on the pannel: Held, that this was no ground of challenge to the array for unindifferency on the part of the sheriff. Held, also, that it is not competent to ask jurymen (whether special jurymen or talesman) if they have not, previously to the trial, expressed opinions hostile to the defendants and their cause, in order to found a challenge to the polls on that ground; but that such expressions must be proved by extrinsic evidence.

This was an indictment against the defendants for a conspiracy, upon which they were tried and found guilty at the last Summer Assizes for the county of Warwick, before the Lord Chief Baron. Denman in last Michaelmas term obtained a rule nisi for a new trial on the three following grounds; 1st, that the Lord Chief Baron had refused to allow a challenge to the array, on the ground of the alleged unindifferency of the Master of the Crown Office in nominating the special jury, and to appoint triers to try the facts alleged in support of that charge; 2dly, that he refused similarly to allow a challenge to the array, on the ground of the alleged unindifferency of the sheriff, and to appoint triers as before; 3dly, that he refused to permit questions to be put to the special jurymen, as to whether they had expressed themselves adversely to the defendants before the trial, although (the special jury, **[472]** not being full,) he did permit such questions to be put to the talesman before they were sworn. The motion was supported by affidavits, stating the different grounds of the complaint against the Master of the Crown Office and the sheriff. Against this rule, cause was shewn in Hilary term, upon affidavits, by the Attorney-General and Solicitor-General, with whom were Vaughan Serjt. Clarke, Reader, Littledale, and Balguy. Denman and Hill were then heard in support of the rule. The whole facts and arguments on both sides are so fully stated by the Court in giving judgment, that it has been deemed expedient to omit them here.

Abbott C.J. This was an application to the Court for a new trial. The cause (an indictment prosecuted by His Majesty's Attorney-General for a misdemeanour) came on to be tried by a special jury at the last Summer Assizes at Warwick. The special jury was struck in or soon after Hilary term, 1820, and the record was carried down for trial at the Spring Assizes in that year, but stood over until the summer. The ground of the motion for a new trial was the refusal to allow certain challenges, supposed to have been duly taken at the trial: viz. a challenge to the array, and a challenge to some of the polls. The challenge to the array was made on two distinct grounds; first, the supposed unindifferency of the Master of the Crown Office, by whom the special jury was nominated. Secondly, the supposed unindifferency of the sheriff. The supposed challenge to the polls was on the ground of opinions, supposed to have been expressed by the jurors hostile to the defendants, or some of them, and to their cause. Before I make any comments on these grounds, I will **[473]** observe that it is an established rule as to proceedings of this kind, that no challenge either to the array or to the polls can be taken, until a full jury shall have appeared, and if twelve of those named in the original pannel do not appear, a tales must be prayed, and the appearance of twelve obtained before any challenge be made. Upon this point, it will be sufficient to refer to the case of *Vicars* v. *Langham*, Hob. 235. In that case, the plaintiff first prayed a tales, and after the jury made full by tales, he challenged the whole pannel by exception to the sheriffs. The pannel was thereupon quashed, and a new jury returned by the coroners, by which the cause was tried. A writ of error was brought, and the exception taken thereon was, that the plaintiff having first prayed a tales to the sheriffs and obtained it, was estopped to challenge the pannel for exceptions to the sheriffs. But it was resolved, that there could be no challenge, neither to the pannel nor to the poll, till first there were a full jury, so that the jury

not appearing full, there was a necessity to have a tales, or else the challenge could not have been taken; and so the cause would have remained pro defectu juratorum, if the plaintiff had not prayed it, for the defendant could not, and so the judgment was affirmed. Now every one of the challenges taken at this trial, was taken and made before a full jury had appeared, and therefore made irregularly and out of season. It must further be observed, that the disallowing of a challenge is a ground not for a new trial, but for what is strictly and technically a venire de novo. The party complaining thereof applies to the Court, not for the exercise of the sound and legal discretion of the Judges, but for the benefit of an imperative rule of law, and the improper granting, **[474]** or the improper refusing of a challenge, is alike the foundation for a writ of error. Every challenge, either to the array or to the polls ought to be propounded in such a way, that it may be put at the time upon the Nisi Prius record, and so particular were they in early times, when challenges were more in use, that it was made a question in 27 H. 8, 13, B, pl. 38, whether it was not a fatal defect to omit the concluding of it, with an "et hoc paratus est verificare," and it was, because many precedents were shewn without such a conclusion, and the justices did not choose to depart from the precedents that it was held unnecessary. When a challenge is made, the adverse party may either demur (which brings into consideration the legal validity of the matter of challenge) or counterplead, (by setting up some new matter consistent with the matter of challenge, to vacate and annul it as a ground of challenge,) or he may deny what is alleged for matter of challenge, and it is then, and then only that triers are to be appointed. The case before quoted from Hobart furnishes an instance of a writ of error, for the allowance of a challenge, which could not have been brought, unless the challenge had been returned on the postea: and in comparatively modern times there are two instances of the like nature. One in *Kynaston* v. *Mayor, &c. of Shrewsbury*, Andr. 85, and another in *Hesketh* v. *Braddock*, Burr. 1847. In the latter case, the defendant challenged both the array and the polls; both challenges are entered upon the record. To the first, (and probably to the second) the plaintiff demurred. The demurrer was allowed, the challenges over-ruled, and the cause tried. Error was brought thereon, and the judgment reversed, and upon the **[475]** judgment of reversal, a writ of error was brought in the King's Bench. The validity of the grounds of challenge was then again discussed, and the judgment of reversal was affirmed. The challenges, therefore, ought in this case to have been put upon the record, and the defendants are not in a condition in strictness to ask of the Court an opinion upon their sufficiency. But notwithstanding this defect of form on the part of the defendants, the Court has taken into consideration the validity of these challenges, and it is upon the ground of their invalidity, not on the defect of form, that we think the new trial ought to be refused. It has never been the practice of the Court to grant a new trial, for the purpose of giving a party an opportunity of advancing an untenable objection, and I have noticed these points of irregularity, chiefly in answer to one of the topics that was addressed to us on the part of the defendants. It was said the defendants had a right to make their challenge, and to have it tried, whether they could sustain it by proof or not. To which I answer, if they had that right and would insist upon it, they should have pursued it rightly and regularly. Not having done so, their ground and their intended proof must be open to examination. And if upon examination, it appear that they could not have sustained their challenge, they are not entitled to a delay of justice, in order to give them an opportunity of making an experiment in due form, which, in the opinion of the Court, would be deficient in substance. I proceed, therefore, to examine the grounds and substance of the several challenges.

And first, as to the challenge of the array, that is, of the whole special jury pannel, for the supposed unindif-**[476]**-ferency of the Master of the Crown Office. To sustain this charge of unindifferency, several matters of fact were mentioned, from some or all of which it was contended, that triers, if appointed, might infer that the officer was not indifferent. Of those matters, two were of a general nature, and two more especially addressed to the particular case in question. First, it was said, that the officer had selected the names of the jurors, and not taken them by some mode of mere hazard or chance from the freeholders' book. Secondly, that in this selection he had taken those names only which had the addition of esquire. Thirdly, that among those selected and ultimately retained by him, some were gentlemen acting in the commission of the peace for the county. Fourthly, that the original nomination com-

prised several persons, who, as grand jurymen, had found the present indictment; and that although this objection was pointed out to the Master, as soon as it was discovered, that two or three gentlemen whom he had named were of that class, yet he persisted to retain those and to name others, until the Solicitor of the Treasury, being consulted, consented to abandon them; upon which he struck them all out, and substituted other names in their places. Before the discussion of these points, a preliminary enquiry must be made; and if it shall turn out that there cannot, by law, be any challenge of the array at a trial, on any supposed ground of unindifferency in the officer of the Court who has nominated a special jury, the consideration of these points will become immaterial, or material only in another view of the subject.

It cannot be, or at least it has not hitherto been ascertained, at what time the practice of appointing special [477] juries for trials at Nisi Prius first began. It probably arose out of the practice of appointing juries for trials at the Bar of the Courts at Westminster, and was introduced for the better administration of justice, and for securing the nomination of jurors duly qualified in all respects for their important office. It certainly prevailed long before the statute 3 G. 2, c. 25, and was recognized and declared by that statute, which refers to the former practice. The whole matter is comprised in the fifteenth and two following sections of the statute. The fifteenth section begins by reciting, that some doubt had been conceived, touching the power of the Courts at Westminster to appoint juries to be struck before the Clerk of the Crown, Master of the Office, prothonotaries, or other proper officer of the respective Courts, for the trial of issues depending in the Courts, without the consent of the prosecutor or parties concerned, unless such issues are to be tried at the Bar of the same Court, and then declares and enacts, that it shall be lawful for the Courts, upon motion made on behalf of His Majesty, or of any prosecutor or defendant, in any information or indictment for misdemeanor, &c.; or plaintiff or defendant in any action or suit, and the Courts are thereby authorised and required, upon such motion, to order and appoint a jury to be struck before the proper officer of the Courts, in such manner as special juries have been and are usually struck in such Courts, upon trials at Bar had in the same Courts; which said jury, so struck as aforesaid, shall be the jury returned for the trial of the said issue. The sixteenth section relates only to the costs. The seventeenth section enacts, that when a special jury shall be ordered to be struck, in any cause arising in any city or county of a city, or town, the [478] sheriff or undersheriff shall be ordered, by the rule, to bring before the proper officer the books or lists of persons qualified to serve on juries within the same, in like manner as the freeholders' book hath been usually ordered to be brought, in order to the striking of juries for trials at Bar, in causes arising in counties at large, and the jury shall be taken and struck out of such books or lists. Upon this statute it may be observed, first, that there is no provision as to the mode of taking and striking the special jury; but that matter is left to the ordinary practice used in cases of trials at Bar. 2dly, that there is a positive enactment, that the jury so struck shall be the jury returned for the trial of the issue. And, 3dly, that although the statute contains a provision for the attendance of the sheriff of the county of a city or town, it contains none as to the attendance of the sheriff of a county at large; leaving that to be enforced according to antecedent practice, which may well be supposed have been more perfectly established in the cases of counties at large, than in smaller districts, by reason of its more frequent occurrence. This statute, therefore, must necessarily be understood and construed, in many respects, by reference to the antecedent and existing practice of the Courts. And, notwithstanding all the learning and research that have been bestowed on the present case, on the part of the defendants, not one solitary instance has been found of an offer to challenge the array on the supposed ground of unindifferency in the officer of the Court by whom a jury had been nominated for any trial, either at Bar, or at Nisi Prius, either before or since the statute; although there must have been many occasions, on which it may reasonably [479] be presumed, that such a step would have been taken, if it had been thought maintainable.

In considering the causes of the absence of any such attempt in former times, it will be proper to advert to the circumstances under which a challenge to the array is made in other cases. Such a challenge is always grounded upon some matter personal to the officer by whom the jury has been summoned, and their names arrayed or placed in order upon the parchment or pannel whereon they are returned, in writing, to the

Court. Upon trials for felony, this pannel is not in any manner published or made known, until the sitting of the Court, at which the trial takes place; and, therefore, that sitting necessarily furnishes the first opportunity of making any objection to it. Upon other trials, and in the Superior Courts, there have always, or at least almost universally, been two successive processes to enforce the attendance of the jury. First, a venire returnable in the Court above, at the place of its sitting, and in some day in term. To this process, the sheriff formerly made an actual return of the names of jurors as summoned, but the jurors themselves did not appear. This, therefore, was followed by a second process, more compulsory in its nature, requiring their attendance in the Court, in like manner, on some other day. This process is still issued in its primitive and unqualified form for trials at Bar; but, for trials at Nisi Prius, it contains a clause, inserted by virtue of the ancient Statute of Nisi Prius, qualifying the command for their attendance in the Court above, in case the Justices of Assize shall, before the day appointed, come into the county at some day and place particularly mentioned. Upon this view of the process, and adverting to that established rule **[480]** which postpones a challenge of the array until the actual appearance of a full jury, it is manifest that no party has an opportunity of making such a challenge until the cause has been actually called on for trial. This, therefore, being the first opportunity, is, in the ordinary course, the proper time and season for such a challenge, where the jury have been impannelled and chosen in the usual way by the sheriff. But as the effect of such a challenge, if allowed, would often be to delay the trial, it became usual for a plaintiff, who anticipated that such a challenge might be effectually made, to apply to the Court, and suggest the objection to the sheriff, and, if this was not denied, the Court directed its process to the coroners of the county instead of the sheriff. And, in case the coroners also were liable to objection, and this was suggested to the Court, then the Court appointed certain persons of its own nomination, called elizors, to whom the process should be directed. And this course of practice is not altogether obsolete at the present time. The coroners, like the sheriff, are general officers, and not the particular officers of the Court; amenable, indeed, to the Court for misconduct, but acting officially under the general authority of the law, and not, like elizors, under the special authority of the Court. The array, therefore, may be challenged for causes of personal objection to the coroners. But where the process has been directed to elizors, there can be no challenge of the array, Co. Litt. 158 a.; because, saith the author, they were appointed by the Court; but he may have his challenge to the polls. So, likewise, on a writ of right, whereon the sheriff returns to the Court four knights, by whom, after being sworn for this purpose, twelve others are chosen and named in **[481]** the presence of the parties, to constitute with the same knights the grand assize, or trying jury, consisting of sixteen persons, there cannot, after the pannel is returned by the four, be any challenge, either of the pannel or of the polls; though the twelve, before any assent or return of the pannel, may be challenged before the four knights electors. Co. Litt. 294. See also Booth's Real Actions, p. 97 and 102, 7 Hen. 4, fo. 20. Now the nomination of a special jury by the known and general officer of the Court, whether the Clerk of the Crown or Master of the Office, or otherwise, is precisely analogous to a nomination by elizors specially appointed by the Court for the particular purpose; and, as the array cannot be challenged in the latter case, I am unable to discover any satisfactory reason for saying, in the absence of all practice and authority, that it may be challenged in the former. The reason for disallowing it holds equally in both cases; the Court may be applied to. If there be any reasonable personal objection, sworn before-hand, the Court will, upon proper application, order the nomination to be made by another officer: if any reasonable objection arises from the conduct of the officer on the particular occasion, the Court, having power over its own rule, at least until every thing shall have been completed under it, can reform and correct, and, if necessary, make a new rule for nomination by another officer, or abrogate the rule entirely, and leave the nomination to the sheriff. If the application be not made, or be refused by the Court as unreasonable, it may well be supposed that no reasonable objection exists, especially when it is considered that the party has the power of striking out twelve names.

[482] Another reason against allowing such a challenge is, the great inconvenience that would ensue, and the almost utter impossibility of enquiring into the matter satisfactorily at Nisi Prius. If such a challenge can be allowed in one case, it must

be allowed in all, criminal and civil, for the prosecutor and for the defendant. And such challenges may be used as an instrument of delay or vexation at every assizes throughout the kingdom, and must be tried in the absence of the person by whom the pannel has been formed, and consequently without any opportunity of answer or explanation; whereas the sheriff and the coroners are bound by the duty of their office to attend at the assizes, and in fact almost invariably do so.

I have already mentioned, that the practice of nominating jurors under a rule of the Courts at Westminster, is antecedent to the statute, and confirmed by it; and I must here again notice the concluding words of the 15th section, "which said jury, so struck, shall be the jury returned for trial of the issue." I cannot reconcile that expression to the supposition, that any idea was entertained by the Legislature that the jury so struck and returned, that is, the whole pannel and the whole proceeding, should be set aside at Nisi Prius, at least upon any challenge to the favour. In the case of *The King* v. *Johnson*, the challenge was on an objection to the sheriff; and the answer, that he was acting under a rule of the Court, could not be satisfactorily given at Nisi Prius, because the other party was not prepared with the rule of Court. This matter appears to have been introduced by way of counterplea to the challenge; and there was a special demurrer to the counterplea, assigning, among other causes, the non-production of the **[483]** rule. And, according to the account of the case in the Crown Circuit Companion, pp. 105, 6, of the eighth edition, the Judges of Chester held the counterplea ill, because the Court there could not take notice of the rule of Court; and Lord Hardwicke afterwards said the Judges had done right, because the rule of the Court could not be taken notice of. And this appears to be a more satisfactory reason than that which is mentioned in the report in 2 Strange, 1000 (which reason, however, does not apply to the present point), namely, that the sheriff would have the ordering of the names on the pannel. It may be further observed, in support of the reason mentioned in the Crown Circuit Companion, that the trial being in Cheshire, the jury process did not issue from this Court; but the record was sent by mittimus to the chamberlain of the County Palatine, and the jury process issued from the Court of Great Sessions; and the case was tried at the Bar of the Court there, in the usual course.

One other instance only of challenge of the array of a jury nominated under a rule of Court was mentioned, viz. *The King* v. *Burridge* (1 Str. 593). This was before the statute; and it appears to have been thought that the rule of Court could not dispense with the rule of law as to hundredors. It is unnecessary to give any decisive opinion on that point at present; I will therefore only say, that if it be law, great inconvenience may ensue.

We are all, therefore, of opinion, that a challenge to the array cannot be taken at Nisi Prius for the supposed unindifferency of the officer, by whom the jury was nominated under a rule of Court, according to the statute. Indeed, it stands as a matter of doubt in the books, whether any challenge to the array, which oper-**[484]**-ates only as a challenge to the favour, like the present, can be taken against the Crown. This being doubtful, I place no reliance upon it. And as these defendants had two entire terms in which they might have applied to this Court, and forbore to do so, unless their objections could prevail as grounds of challenge, they must be of a very plain and cogent nature to induce the Court to listen to them at this stage of the proceedings for the purposes of a new trial, which would be contrary to all rules and analogy of practice. So that it is not absolutely necessary to notice or discuss the particular grounds alleged. But it will be more satisfactory to do so; and I will therefore, for the purpose of considering them, suppose that the array may, in a case like the present, be challenged for alleged unindifferency in the officer who nominated the jury.

The first ground was, that the officer selected the names, and did not take them by some mode of chance or hazard. Now such a mode would be contrary to all precedent and example. Jurymen have always been named by the discretion of some person; of the sheriff, the coroners, or elizors. In special juries, before the statute, they were named by an officer of the Courts; the statute recognizes and confirms the practice in general terms. It is impossible to suppose, that the Legislature passed a statute to confirm the practice, without knowing how that practice was conducted; and not less impossible to suppose, that an Act of Parliament, evidently passed for the purpose of obtaining jurymen of some superior qualification, should be carried

into effect by the adoption of a mode that would leave the qualification absolutely to chance. 2dly, the second ground was, that the officer nominated those persons [485] only whose names had the addition of esquire, or of some higher degree. On a charge of partiality, it is material to consider, whether the Act be according to usage and precedent, or a departure from them. And it is well ascertained, that the nomination of gentlemen of this class is according to the general and ancient usage of all the Courts, so that it affords not the slightest evidence of partiality in the particular case. Something like ridicule was attempted to be cast upon this addition of esquire in the freeholders' book, and we were told, that it is the constable who makes the esquire. But how is it that the constable acts in this case under the statute that was referred to? He selects from the rate-book of his parish, the names of persons qualified to serve on juries, and affixes the list on the church-door in the first instance, and afterwards returns it to the Quarter Sessions, and we must therefore suppose, that he gives to each individual the addition and description by which he is usually known and addressed in his own neighbourhood. But, suppose the constable to give this addition to persons of inferior rank, and to withhold it from those of superior, he may indeed, by so doing, deceive the officer of the Court in some respect, but he will do nothing of which these defendants can complain without inconsistency, because they say, they ought not to be tried by persons above the common degree, and this is the substance of their complaint against the nomination of esquires. Nor is partiality in any degree evidenced by the particular circumstance on which so much stress was laid, namely, the small number of persons having the addition of esquire in the freeholders' book of Warwickshire; indeed, that circumstance has a contrary tendency, because by nar- [486] -rowing the choice, it shews that the officer looked to a class only, according to the usual practice, and not to the personal character of particular individuals. If he had looked at the latter, he would naturally have taken to himself a larger scope, as furnishing more numerous objects for his selection. It is the very object of a special jury to obtain the return of persons of a somewhat higher station in society, than those who are ordinarily summoned to attend as jurymen at Nisi Prius. And a similar practice has long prevailed, even in the execution of writs of inquiry of damages, before the sheriff; wherein a party obtains, on application, a rule of the Court, in obedience to which, the sheriff summons persons of a somewhat higher class, than those by whom he is ordinarily attended. This object is accomplished in the mode open to the smallest portion of suspicion or objection, by adverting to the addition placed against the name. And we have no doubt, that the officer has the power of nomination, and of nominating only from the higher classes according to the ancient practice, and that he acts wisely in doing so, unless there be some special reason for adopting a new and different course. In the present instance, we have the affidavit of the officer, stating, that, to the best of his knowledge and belief, he knew not even by name more than two of the persons whose names he put upon the list; that he had not, to the best of his knowledge, ever seen more than one of them, and that one only once; and further, that he knew nothing of or concerning the connections or principles of any of them, by which he was influenced in his nomination; and that he nominated each of them solely, because, in looking indiscriminately over the books, in the manner that he has mentioned, he met [487] with his name among that class of persons, from which, according to his opinion, the special jurors have been usually struck.

The third ground of complaint was, that the officer named several gentlemen acting under the commission of the peace for the county. It was said that those gentlemen must be supposed not to be unindifferent between the Crown and the defendants, upon this, which was termed a political prosecution, because they hold their office at the pleasure of the Crown. I do not exactly know what is meant by a political prosecution; the present, as I collect from the indictment, is a prosecution for a high misdemeanor against the public peace, and the constitution and rights of one branch, at least, of the Legislature of the country. It is true, indeed, that justices of the peace hold their office at the pleasure of the Crown, but they hold a laborious and burthensome, and not a profitable office; and it is really a gross calumny upon a class of persons, to whom the nation is most peculiarly indebted for valuable and gratuitous services, to suppose that they will not act impartially between the King and his people. If gentlemen of this description should be returned by the sheriff, no challenge could be taken to them individually, as a challenge to the polls, on the ground of their office;

it has been the constant practice, to name some gentlemen of this class on special juries, or rather no one has ever thought of omitting them on the nomination. Some of them are constantly returned by the sheriff as grand jurymen; and no man, who wishes well to the country, can wish to see them excluded as a class, and by reason of their office, from any portion of the admi-[488]-nistration of justice, wherein they have been accustomed to take a part.

The last ground of complaint on this head, was the original nomination of some of the gentlemen who had been named on the grand jury, by which this indictment was found. The Master of the Crown Office has informed us, upon his oath, that he did not consider this fact to form a valid objection to their nomination. And taking this, as we are bound to take it, not merely from the particular oath, but from the well known and general honour and integrity of that officer, to be true, it is impossible to say, that, although he might be mistaken in his opinion, he did not act honestly in abiding by it, until the Solicitor of the Treasury consented to waive the nomination. The nomination was waived and abandoned, and in fact, every name of this description was struck out of the list of 48, and other names substituted, before the list was delivered out to the parties for reduction; so that the defendants sustained no possible prejudice or inconvenience from the intended nomination.

And here I will observe, that this circumstance affords an instance of the utility of the presence of the parties at the time of the nomination of the 48, which we were told would be useless, if the officer might name at his pleasure. For if the parties had not been present, it is probable that some names of this description might have stood among the 48, either from ignorance of the fact, or from the mistaken opinion of want of objection to them. The presence of the parties may enable them, on many occasions, to give useful hints which the officer will adopt, as for instance, the death, absence, or ill health, of a person named in the freeholders' book.

[489] The only remaining ground of challenge to the array was, the supposed unindifferency of the sheriff; and this was to be manifested by the supposed omission to summon one of the gentlemen named in the pannel of the special jury. This was treated as a challenge to the favour for unindifferency. It could not be a ground of principal challenge, according to any authority. Considering it as evidence of partiality, let us see how the fact stands. The under-sheriff directed the summons of this gentleman, at the same time and manner as of the others named in the pannel. The inferior officer, whose duty it was to serve the summons, sent it in a very negligent and blameable manner, together with a summons in some other causes, by a carrier or newsman, instead of taking it himself. This was done without the privity of the high sheriff, or his under-sheriff. How, then, can it lead to any inference of partiality in the mind of either of those officers? But, further, how were the defendants prejudiced by it? Mr. Peach, the gentleman in question, appears, by the affidavits before us, to have been long in an infirm state of health; to have been summoned, either as a grand or special juryman, to every assizes at Warwick, for the last eight years, and never once to have attended; and to have been summoned to this very assize, in due time, on some other cause, but not to have obeyed that summons. So that, upon the whole, we must conclude, that, at whatever time or manner summoned for the present trial, this gentleman would have availed himself of that excuse for absence which the state of his health afforded. It is, therefore, really absurd, to treat this neglect of the inferior officer, as furnishing evidence of partiality in the sheriff to sustain a challenge of the array on that ground, or as an inducement to this Court to grant a new trial.

[490] The last ground of the motion for a new trial, was the refusal of what has been called a challenge to the polls, in the case of the special jurymen. This challenge was made on the ground of opinions supposed to have been expressed by those gentlemen hostile to the defendants and their cause. There was no offer to prove such an expression, by any extrinsic evidence, but it was proposed to obtain the proof, by questions put to the jurymen themselves. The Lord Chief Baron refused to allow such questions to be answered; and, in our opinion, he was right in this refusal. It is true, indeed, that he permitted similar questions to be answered by the talesmen; but in so doing, we think he acted under a mistake. It does not appear, distinctly, in what precise form the question was propounded; but, in order to make the answer available to any purpose, if it could have been received, it must have been calculated to shew an expression of hostility to the defendants, or some of them, a pre-conceived

opinion of their personal guilt, or a determination to find them guilty; any thing short of this would have been altogether irrelevant. The language of Mr. Serjeant Hawkins upon this subject, lib. 2, c. 43, s. 28, is, that if the juryman "hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like, yet if it shall appear that the juror hath made such declaration from his knowledge of the cause, and not out of any ill-will to the party, it is no cause of challenge." So that, in the opinion of this learned writer, the declaration of a juryman will not be a good cause of challenge, unless it be made in terms or under circumstances denoting an ill intention towards the party challenging. A knowledge of certain facts and an opinion that those facts constitute a crime, are certainly no grounds of challenge, for it is **[491]** clearly settled, that a juryman cannot be challenged by reason of his having pronounced a verdict of guilty against another person charged by the same indictment (*a*)[1]. In Brook, Challenge, pl. 90, it is thus stated: It is a good challenge, to say that a juryman has reported, that if he be impannelled, he will pass for the plaintiff; and 21 Hen. 7, 29, is referred to. Ibid. Challenge, 55. Another juryman was challenged for favour, in a suit of replevin; Babington; if he has said twenty times that he will pass with the one party for the knowledge that he has of the matter and of the truth, he is indifferent; but if he has said so for any affection of the party, he is favourable, and he charged the triers accordingly; and 7 Hen. 6, fo. 25, is cited. In Fitz. Chall. 22, the opinion of Babington is thus given: "If he will pass for one party, whether the matter be true or false, he is favourable; so, if he has said that he will pass for one party, if it be for affection that he has to the person, and not for the truth of the matter, he is favourable; but if it be for the truth of the matter that he has knowledge of it, he is not favourable; wherefore you will enquire according to what I have said." The charge of Babington to the triers, as given in the Year-Book, 7 Hen. 6, fo. 25, is thus. Addressing himself to the triers, he says; "If, whether the matter be true or false, he will pass for the one or the other, in that case he is favourable; but if a man has said twenty times that he will pass for the one or the other, you will enquire, on your oaths, whether the cause be for affection that he has to the party, or for the knowledge he has of the matter in issue; if for affection that he **[492]** has to the party, then he is favourable, but otherwise not; and if he has more affection to one than to the other; but if he has a full knowledge of the matter in issue, if he be sworn, he will speak the truth, notwithstanding the affection he has for the party, then he is not favourable." Again, Bro. pl. 90. By Frowick J.; "Not sufficient of freehold is a good challenge; and upon this the party himself shall be sworn, whether he has sufficient or not." In the 49 Edw. 3, fo. 1, it appears, that some of the jurors were challenged, for that they had declared the right of one party or of the other beforehand, or given their verdict beforehand, and some for that they were of counsel with one party or the other, and of their fees: and mesmes les persons, that is the persons themselves, were sworn to speak the truth, where the challenge did not go to their reproof or shame; but those who were challenged, for that they had taken of the party, or procured without taking, were not sworn on the voir dire to give evidence to the triers.

These ancient authorities shew, that expressions used by a juryman are not a cause of challenge, unless they are to be referred to something of personal ill-will towards the party challenging; and also, that the juryman himself is not to be sworn, where the cause of challenge tends to his dishonour; and, to be sure, it is a very dishonourable thing for a man to express ill-will towards a person accused of a crime, in regard to the matter of his accusation. And accordingly, we find it established in later times, namely, at the trial of Peter Cook (*a*)[2], in the eighth of King William the Third, that such questions are not to be put to the juror himself. So **[493]** that all the authority in the law on this head is against the defendants, and shews, that the refusal of the Lord Chief Baron to allow the proposed questions to be answered by the special jurymen, was most proper and agreeable to law. Upon the whole matter, we all think that the rule for a new trial must be discharged.

Rule discharged (*a*)[3].

(*a*)[1] See *P. Cook's case*, 13 St. Tr. 313, and 7th resolution in the case of *The Regicides*, 5 St. Tr. 985, and *Cranburne's case*, 13 St. Tr. 221, Howell's edition.

(*a*)[2] 13 St. Tr. 334, Howell.

(*a*)[3] In *P. Cook's case*, 13 St. Tr. 339, the prisoner having asked one of the petty