4. *High Treason—Evidence—Acts of others charged by way of Conspiracy.*
   On an indictment for high treason there are two cases in which the acts and declarations of some of the alleged parties to the conspiracy are evidence against others: 1st, a conspiracy having been proved, to prove the overt acts stated in the indictment; 2nd, by way of foundation, to prove the existence of the conspiracy with a view to showing afterwards that the prisoner adopted and became a party to it.
   One of the overt acts being that the prisoner led an armed force against the town of Newport, evidence of the presence of such a force in the neighbourhood the night before, held provisionally admissible, before showing that the prisoner was connected with it.
   Evidence of the orders given to the mob, and of the statements made to them regarding the purpose of the march, held admissible, without showing they were made in the presence of the prisoner.

5. "*Names, Profession, and Place of Abode of Witnesses*" *under 7 Anne, c. 21. s. 11.* See rulings at pp. 172, 227, 253, 298, 306.

6. *Alphabetical Jury Panel—Selection of the Jury by Ballot permissible.* See p. 110.

7. *Evidence in Reply—Right of Comment on.* See pp. 386, 387.

8. *Assistant Counsel not recognised in Treason Cases.* See p. 105.

Opening of the Special Commission at Monmouth.

December 10, 1839.

On the 19th day of November 1839, there issued a special commission of oyer and terminer under the Great Seal of the United Kingdom of Great Britain and Ireland, to inquire of certain high treasons and misprisions of treason, committed within the county of Monmouth; and a special commission of gaol delivery as to all persons who were or should be in custody for such offences on or before the 11th day of December following.

On the 10th day of December, at ten o'clock, the special commissions were opened in the Crown Court at Monmouth.

Present:—The Right Honourable Lord Chief Justice Tindal, the Right Honourable Mr. Baron Parke, the Honourable Mr. Justice Williams.

The Court then adjourned to one o'clock, when the Sheriff (*Colthurst Bateman*, Esq.) delivered in the panel, which was called over.

The grand jury having been sworn, the Lord Chief Justice charged them as follows:—

My Lord, and gentlemen of the grand jury, Her Majesty having been pleased that we should be assembled this day, under commissions issued, not for the holding of an ordinary assize and gaol delivery, but on a special and extraordinary occasion, it has become my duty to lay before you the nature and description of the offences to which those commissions extend, the class and character of the cases which will probably be brought under your investigation, and the law which will apply to such cases respectively.

Gentlemen, with the very limited means of knowledge which I possess on the subject, it could not be expected, neither would it be proper, that I should attempt, with any minuteness of description, to enter into the history of that transaction which has formed the occasion of our being convened together at the present time. Indeed, it is so desirable that you should approach the performance of your duty without any prepossession in your minds as to the facts which may be proved before you, that I shall purposely abstain from saying more than that it is matter of public notoriety, that disturbances have recently taken place within this county, of such description and character, and of such magnitude and extent, as to render it highly probable that, amongst other charges, indictments for high treason will be preferred against some of the parties who are supposed to have taken a share in those proceedings.

The commission of oyer and terminer, one of the commissions under which we sit, is in itself general and unlimited in its terms and extent. It comprehends within it all treasons, misprisions of treason, all felonies and misdemeanors whatever. But as the only criminal charges that are proposed to be brought before you are those which originate from or are connected with the disturbances al referred to, with respect to which, a have already observed, there can be l doubt that presentments for high tre will be brought forward, my duty wil in the first place, to offer you such marks upon the law of high treason may assist you in the performance of important functions you may be c upon to execute.

Gentlemen, the crime of high treason, in its own direct consequences, is calculated to produce the most malignant effects upon the community at large; its direct and immediate tendency is the putting down the authority of the law, the shaking and subverting the foundation of all government, the loosening and dissolving the bands and cement by which society is held together, the general confusion of property, the involving a whole people in bloodshed and mutual destruction; and, accordingly, the crime of high treason has always been regarded by the law of this country as the offence of all others of the deepest dye, and as calling for the severest measure of punishment. But in the very same proportion as it is dangerous to the community, and fearful to the offender from the weight of punishment which is attached to it, has it been thought necessary by the wisdom of our ancestors to define and limit this law within certain express boundaries, in order that, on the one hand, no guilty person might escape the punishment due to his transgression by an affected ignorance of the law; and, on the other, that no innocent man might be entangled or brought unawares within the reach of its severity by reason of the law's uncertainty; and accordingly in the Parliament of the 25th year of King *Edward* 3. an Act (*a*) was passed, intituled, "A Declaration which Offences shall be adjudged Treason;" and upon this ancient statute, expounded, and in some degree enlarged, by a statute (*b*) passed in the 36th year of King *George* 3. stands the law of treason at the present day, so far at least as relates to any of the cases which can by possibility be made the subject of your inquiry.

The statute of *Edward* 3. declares it to be treason—

"when a man doth compass or imagine the death of our Lord the King,"

(within which designation a Queen regnant is included),—

"or if a man do levy war against our Lord the King in his realm, and thereof be proveably attainted of open deed by the people of their condition."

The statute afterwards declares:—

"is to be understood that in the cases rehearsed, that ought to be judged treason which extends to our Lord the King and [illegible] Majesty."

A more recent statute of *George* 3., temporary only at first, but afterwards made perpetual, (*a*) it is enacted—

"That if any person shall, witthin the realm or without, compass, imagine, invent, devise or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the King, or to deprive or depose him from the style, honour, or kingly name of the imperial Crown of this realm, or to levy war against his Majesty within this realm, in order by force or constraint to compel him to change his measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe both Houses or either House of Parliament, ... and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter or declare, by publishing any printing or writing, or by any overt act or deed, ... every person convicted in the manner therein mentioned shall be deemed, declared and adjudged to be a traitor."

Gentlemen, it cannot have escaped your observation, that in the statute of *Edward*, the substantive offence of treason thereby declared, consists in affecting the life of the King; and in the later statute, the substantive offence of the several treasons thereby created, consists in the compassing, intending, devising, and imagining the perpetration of the several acts therein specified, not in the commission of the acts themselves. But inasmuch as the wicked imaginations of men's hearts are known only to the Supreme Being, until they are evidenced to man by outward act, so the former statute has required, that before anyone should become subject to the penalties of treason, he shall be thereof proveably attainted "of open deed." And again by the later statute it is enacted, that before anyone falls within its penalties, he shall express, utter or declare such his compassings, imaginations and intentions, by publishing some printing or writing, "or by some overt act or deed." Gentlemen, these overt acts, therefore, so required by the statute, are the means by which the particular treason has been attempted to be carried into effect; they are the instances in which the guilty party has endeavoured to complete the treasonable design; they are the *indicia*, or proof of the treason, not the treason itself. It is obvious, therefore, that these overt acts will be found to vary in each particular case. Where the object of the treason has not been actually perpetrated, combinations and conspiracies to carry it into effect, meetings to pro-

(*a*) 25 Edw. 3. stat. 5. c. 2.
(*b*) 36 Geo. 3. c. 7.

(*a*) 36 Geo. 3. c. 7. and 57 Geo. 3. c. 6. s. 2; but see now 11 & 12 Vict. c. 12., Treason Felony Act, by which the provisions of both Acts are repealed except as to offences against the person of the sovereign.

pose, to plan, to mature, or to accelerate its completion, the inciting and procuring others to join such combinations, the knowingly making, procuring, or furnishing arms and ammunition, money or other necessaries to insurgents, for the purpose of accomplishing their treasonable designs, the administering illegal oaths to bind men to aid each other in such treasonable designs; all these, and many others of the same stamp and character, might be suggested as instances of overt acts of the particular class of compassing or devising to which they apply, within the meaning of both the statutes. And, gentlemen, as the proof of some overt act or acts is absolutely necessary to support the charge of treason, whatever it may be, so must the proof be confined to those specific overt acts which are charged in the indictment, and no other, in order to give the party accused the opportunity of knowing the real charge which is made against him, and to enable him the better to prepare for his defence, for the overt act is the charge to which the prisoner must apply his defence. And still further with respect to these overt acts, it is to be observed, that in favour of the party accused, a statute (*a*) was passed in the reign of King *William* 3., which enacts, that no person shall be indicted or tried for high treason, whereby any corruption of blood ensues,—

"but by or upon the oaths of two lawful witnesses, either both of them to the same overt act, or one of them to one, and one of them to another overt act of the same treason."

And various other advantages and privileges have been granted by the Legislature from time to time in favour of persons accused of high treason, which do not belong to persons charged with other offences.

Having thus endeavoured to explain to you the nature and property of these overt acts which must be alleged in the indictment, and by what evidence they must be supported, I proceed to call your attention to the different heads or classes of treason which may be laid in the indictment against the accused. It is not improbable that one charge of treason laid in the indictment may be the compassing and imagining the death of our Lady the Queen, and various overt acts may be stated in support of it; and perhaps, amongst the rest, the levying war against the Queen in her realm, which has been held by many decided cases to be an overt act of that species of treason, as well as a substantive treason in itself. But as there can be no reason to suppose that any direct or immediate intention of injuring the sacred person of the Queen can by possibility be surmised to have existed on this occasion, it will be unnecessary, as it appears to me, to occupy you with any observations on this head of treason.

I will proceed, therefore, at once to the only branch of treason which can apply to the circumstances of the present case, that of levying war against the Queen in her realm, which, as before observed, is a direct and substantive branch of treason under the earlier statute, and the bare compassing and intending of which, for the purposes and with the objects mentioned in the later statute, is made treason by that statute. And, in considering the limits and boundaries of this branch of treason, we are not left without lights to guide our steps, so clearly has the law been laid down by decisions of courts of law in more ancient times, and the expositions of those text-writers on the subject who have been held in the greatest veneration, both by their contemporaries and by posterity, amongst whom I shall only refer to the names of Lord Chief Justice *Hale* and Sir *Michael Foster*. I shall proceed, therefore, to call your more particular attention to some instances in which the law has been declared and settled upon this head of treason, the better to enable you to apply the evidence which you shall hear to the several indictments; and for this purpose I cannot do better than avail myself, for the most part, of the very words of Sir *Michael Foster* upon the same subject. It has then been laid down by undoubted authority, that if a large number of persons assembled together, whether armed with military weapons or not, endeavour, by dint of numbers or superior strength, to effect any object or matter purely of a private nature, as, for example, to prosecute some private quarrel, or to take revenge for some private injury, to destroy some particular enclosure, or to remove some particular nuisance, or generally to accomplish some end in which the particular parties assembled together had, or supposed they had, any private interest, such acts of violence and aggression, however the authors of them may be punishable as for a high misdemeanor, do not amount to a levying of war within the statute of *Edward* 3. But every insurrection which, in judgment of law, is intended against the person of the King, whether to dethrone or imprison him, or to oblige him to alter his measures of government, or to remove evil counsellors from about him, all such risings amount to a levying of war within the statute.

"insurrections to throw down all enclosures, or to alter the established law or change religion,

(*a*) 7 & 8 Will. 3. c. 5. s. 2.

enhance the price of all labour, or to open all prisons; all risings in order to effect these innovations of a public and general concern by an armed force are in construction of law high treason within the clause of levying war; for though not levelled at the person of the King, they are against His Royal Majesty; and besides, they have a direct tendency to dissolve all the bonds of society, and to destroy all property and all government too, by numbers and an armed force. Insurrections, likewise, for redressing national grievances, or for the reformation of real or imaginary evils of a public nature, and in which the insurgents have no special interest; risings to effect these ends by force and numbers are, by construction of law, within the clause of levying war, for they are levelled at the King's crown and royal dignity."(*a*)

And accordingly it was held,(*b*) in the time of Queen *Anne*, that a large body of men tumultuously rising and assembled together, with the avowed purpose of putting down all the meeting-houses of Protestant Dissenters, and proceeding to pull down several, until prevented by force, brought the parties who were guilty of that act within the branch of the statute of levying war against the Queen. And in a more recent case,(*c*) where a riotous multitude, headed by Lord *George Gordon*, and acting in concert with the declared design of pulling down or destroying all chapels belonging to those of the Roman Catholic persuasion, proceeded to put that design in force; there was no doubt but that the facts, if proved against the parties accused, would have amounted to the offence of high treason, in levying war against the King.

Gentlemen, an assembly of men, armed and arrayed in a warlike manner with any treasonable purpose, is a levying of war, although no blow be struck; and the enlisting and drilling and marching bodies of men are sufficient overt acts of that treason, without coming to a battle or action. And, if this be the case, the actual conflict between such a body and the Queen's forces must, beyond all doubt, amount to a levying of war against the Queen, under the statute of *Edward*, and to the offence of compassing or devising to levy war within the statute of *George* 3., provided the design and object and intention of the parties be such as is specified in that Act; and, as has already been rted to, it is quite unnecessary to itute the guilt of treason that the ltuous multitude should appear to be npanied with the pomp and pageantry or with military array. Insurrection and rebellion are more humble in their first infancy, but all such external marks of pomp will not fail to be added with the first gleam of success. In case, therefore, any indictment for high treason should be founded on the levying of war, or the compassing or intending to levy war against the Queen, you will, in the first place, direct your attention to the evidence, which shows the object and motive of the rising, whether it was to effect some general and public end, in which the whole community are concerned equally with the insurgents, such as the introduction of any great change or innovation in the government or the laws of the land, by dint of numbers or violence, or whether it was confined to the effecting of any private or local or particular object; and it will be convenient that you should, in the next place, advert to the overt acts alleged on the face of the indictment, and then determine for yourselves whether they or any of them are proved by two witnesses, in the manner before adverted to, one of such overt acts being of necessity to be proved to have taken place in this county, in order to give you jurisdiction.

Gentlemen, it may be proper to inform you, that in the case of treason the law knows no distinction between principal and accessory; all who partake in the treason incur the same guilt, and are liable to the same punishment; the treasonable design once established by the proper evidence, the man who instigated, incited, procured, or persuaded others to commit the act, though not present in person at the commission of it, is equally a traitor, to all intents and purposes, as the man by whose hand the act of treason is committed. He who leads the armed multitude towards the point of attack, and then retires before the blow is struck; he who remains at home, planning and directing the proceedings, but leaving the actual execution of such plans to more daring hands; he who, after treason has been committed, knowingly harbours or conceals the traitor from the punishment due to him, all these are equally guilty in the eye of the law of the crime of high treason.

Gentlemen, I am not aware that any case will be brought before you where the charge will be that of misprision of treason; if such, however, should be the case, it will be unnecessary to say more upon that species of offence than that it presupposes a treason to have been actually committed by others, and that the person charged with the offence, knowing both the traitors and the treason, but without either himself consenting or being a party to the treason, has refused or neglected to make

(*a*) Fost. 210.
(*b*) 15 St. Tr. 522.
(*c*) 21 St. Tr. 485.

a full and fair disclosure of such his knowledge within convenient time to a magistrate, or someone in authority. It is sufficient to describe the offence without entering into any further discussion.

Gentlemen, it is very possible that bills of indictment may be brought before you charging acts of violence committed by some of the individuals who formed a part of the assembled multitude as felony only, not as treason, for he who shoots or attempts to shoot or wound another, is, as you well know, under certain circumstances, guilty of felony, notwithstanding the very same act, when considered with reference to other circumstances, may amount to the crime of high treason. Again, bills of indictment may be preferred against some who participated in the unlawful meeting, but to a less degree, charging them only with the offence of riotously and seditiously assembling themselves together. But with respect to such charges, to gentlemen conversant as you are with the laws relating to offences of that nature, I hold it to be unnecessary to offer a single observation.

Gentlemen, I fear I have already trespassed too long upon your attention; but the importance of the subject which I have felt incumbent on me to discuss, with reference to the just performance of the duties on which you are about to enter, and the rare occurrence (for which we cannot be too thankful) of any occasion which calls for such discussion, must plead my excuse. I cannot, however, conclude my observations without expressing the sincere regret and pity which I feel, not alone, I am sure, but in common with yourselves and with all other men of sound principles, on the occasion of the recent disastrous occurrences. I would add, also, my most earnest hope that it may be found in the result that the great majority of those who may have been involved in the guilt of these transactions have been misled by the arts of wicked and designing men, and have sinned thus through ignorance and blindness rather than from premeditated guilt; and I can suggest no remedy which can be applied successfully to counteract a state of of mind and feeling so unhealthy and diseased, and infecting so large a portion of the community, except the diffusion amongst them of the benefits of religious instruction, and of a sound religious education amongst the rising generation, so that as the younger part of the community advance to manhood they may feel the conviction of the wholesome truth, that they are bound to yield obedience to the laws of their country, not from the terror only which the law inspires, but from a much higher and more binding motive, the fear of the Almighty, and from the thorough belief that "the powers which be are ordained of God."

Gentlemen, in conclusion I entreat you that in approaching this investigation you will dismiss from your minds all which you may have heard upon the subject before you entered this court; and that in the performance of your important office, whilst you will rejoice when the weight of evidence is so light that you can consistently with your duty at once dismiss the party accused to his liberty and his home, you will at the same time watch over yourselves with jealousy, that you weigh the evidence brought before you with a firm, steady, and uncompromising mind, looking to the performance of your duty and to nothing beside, and utterly regardless of all consequences which may follow from the performance of it.

Gentlemen, my learned brethren and myself will be at hand whilst you are engaged in the performance of your arduous labours, and ready at all times to render you any assistance in case any doubt or difficulty as to the law should occur.

On the following day(*a*) the grand jury returned a true bill for high treason against *John Frost*, *Charles Walters*, *John Lovell*, *Richard Benfield*, *John Rees*, *George Turner* (otherwise called *George Cole*), *Zephaniah Williams*, *Edmund Edmunds*, *Jenkin Morgan*, *Solomon Britan*, *William Jones*, *James Aust*, one other *John Rees*, and *David Jones*.

All but the last two were set to the bar.

TINDAL, C.J.: Prisoners, you have been called into Court at this time for the purpose of being informed that the grand jury have found a true bill against each of you for high treason. You will have copies of the indictments and a copy of the panel from which the jury will be taken, delivered to you in due time; the Court wishes to know if you have any counsel or wish to have anyone assigned to you as counsel, and whether you have any attornies; but, if you are not now prepared to answer, you will only have to express your wish between this time and the time of your trial, which will not take place until the 31st of this month, [illegible] shall be attended to.

Wightman: My Lords, I am inst[illegible] by the Crown to apply to the sher[illegible] furnish a copy of the panel.

Owen (an attorney): My Lord, I a[illegible] for one or two of the prisoners, and I [illegible] to make an application to have the m[illegible]

(*a*) The report of this day's proceed[illegible] taken from 9 C. & P. 131.

which was taken from them returned to them. I appear for *Zephaniah Williams*.

TINDAL, C.J. (addressing *Williams*): Do you wish to have this gentleman as your attorney?

Williams: I do, my Lord; 10*l*. was taken from me.

TINDAL, C.J.: Before we can grant your application, Mr. *Owen*, we must know if the money forms any part of the proof.

Wightman: My Lords, on behalf of the Crown we have no objection to give up the money.

TINDAL, C.J.: Then let it be so.

Owen: May I presume to ask, my Lord, if we may not apply to have counsel assigned at a future period between this and the trial?

TINDAL, C.J.: Certainly, upon your making application to Mr. *Bellamy*, the clerk of the Crown.

Bellamy: You can make the application by yourself or by your agent in town.

Owen: I now beg, my Lords, to make application that copies of the depositions may be furnished to the prisoners.

TINDAL, C.J.: The depositions having been returned to the officers of the Court, you may have them on the terms mentioned in the Act.(*a*)

Owen: My Lord, Mr. *Geach* defends some of the prisoners; may I make application also on his behalf?

TINDAL, C.J.: No; but the prisoners may apply themselves.

Waters: I beg leave, my Lord, to apply for the depositions in my case.

TINDAL, C.J.: Certainly.

Owen: I am instructed, my Lord, on the part of Mr. *Frost* to make application that I may be, together with Mr. *Geach*, assigned as his solicitor.

TINDAL, C.J.: Are you partners?

Owen: No, my Lord.

TINDAL, C.J.: What gentleman do you wish to have, Mr. *Frost*?

Frost: I want the two, my Lord.

TINDAL, C.J.: But the Act only gives a power to have one attorney. If there were a partnership it might be otherwise, but without that we have no authority to allow two persons to act as attorneys for one prisoner; any person that you may choose to employ will have free access to you at all reasonable times.(*b*)

Frost: My Lord, a number of papers were taken from my house which, I understand, are to be used against me. I therefore apply either for the originals or copies of these papers.

TINDAL, C.J.: We have no authority to grant that.

Adjourned to December 31.

On December 12, *Maule*, the Treasury Solicitor, delivered to each of the prisoners a copy of the caption and indictment, and a copy of the list of jurors returned by the sheriff.

On December 17 he further delivered to each of the defendants a list of the witnesses to be examined at the trial.

On December 26, at the request of the prisoner *Frost*,(*a*) Sir *Frederick Pollock* and *Kelly* were assigned as his counsel.

MONMOUTH, Tuesday, December 31, 1839.

PRESENT:

The Right Hon. Lord Chief Justice TINDAL.
The Right Hon. Mr. Baron PARKE.
The Right Hon. Mr. Justice WILLIAMS.

Counsel for the Crown: The *Attorney General* (Sir *John Campbell*),(*b*) the *Solicitor General* (Sir *Thomas Wilde*),(*c*) Serjeant *Ludlow*, Serjeant *Talfourd*,(*d*) *Wightman*,(*e*) *Talbot*.

Solicitor: *George Maule*, Solicitor for the Affairs of Her Majesty's Treasury.

Counsel for the prisoner: Sir *Frederick Pollock*,(*f*) *Kelly*.(*g*)

Assistant counsel: *Thomas*.

Solicitor: *W. F. Geach*.

The prisoners were set to the bar.

The indictment found under the Special Commission was delivered into Court, with the usual caption.

Indictment for High Treason.

Monmouthshire } (*First count*) The jurors for
to wit } our Sovereign Lady the Queen upon their oath present that John Frost late of Newport in the county of Monmouth draper Charles Walters late of the same place labourer John Lovell late of the same place

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; & 7 Will. 4. c. 114. s. 3.

7 & 8 Will. 3. c. 3. s. 1, provides that ers shall have "a true copy of the indict- deliv-red to them whereby to enable them ise with counsel thereupon to plead and their defence, his or their attorney or at- ys or agent or agents requiring the same." appears to be the only reference to the attorney in the Act.

(*a*) For Frost, see Dictionary of National Biography, "Forty Years' Recollections," by Thomas Frost, pp. 96–117. Feargus O'Connor advanced 1,000 gs. for the expenses of the defence, which were defrayed by a subscription among the Chartists. See O'Connor's speech, below, p. 1128.

(*b*) Afterwards Lord Campbell, L.C.

(*c*) ,, ,, Truro, L.C.

(*d*) Afterwards a Justice of the Common Pleas.

(*e*) Afterwards a Justice of the Queen's Bench.

(*f*) Afterwards Lord Chief Baron.

(*g*) ,, ,, ,,

labourer Richard Benfield late of the same place labourer John Rees late of the same place labourer George Turner late of the same place labourer otherwise called George Cole Zephaniah Williams late of the same place labourer Edmund Edmunds late of the same place labourer Jenkin Morgan late of the same place labourer Solomon Britan late of the same place labourer William Jones late of the same place labourer James Aust late of the same place labourer one other John Rees late of the same place labourer and David Jones late of the same place labourer being subjects of our said Lady the Queen as false traitors against our said Lady the Queen heretofore to wit on the fourth day of November in the year of our Lord one thousand eight hundred and thirty-nine with force and arms to wit at Newport in the county of Monmouth together with a great multitude of false traitors whose names are to the said jurors unknown to the number of two thousand and more armed and arrayed in a warlike manner that is to say with guns pistols pikes swords daggers clubs bludgeons and other weapons of offence being then and there unlawfully maliciously and traitorously assembled and gathered together against our said Lady the Queen wickedly maliciously and traitorously did levy and make war against our said Lady the Queen within this realm and being so assembled together arrayed and armed against our said Lady the Queen as aforesaid did then and there with great force and violence parade and march in an hostile and warlike manner in and through divers towns villages places and public highways in the county aforesaid to wit at Newport aforesaid in the county aforesaid and did then and there maliciously and traitorously on the said fourth day of November in the year aforesaid with force and arms at Newport aforesaid in the county aforesaid together with a very great number to wit two thousand and more of the subjects of our said Lady the Queen whose names are to the said jurors unknown then and there assembled with divers offensive weapons to wit guns pistols pikes swords bludgeons sticks and staves parade and march with great noise and violence and in an hostile and warlike manner in through and along divers public highways towns villages and places in the county aforesaid to wit at Newport aforesaid in the county aforesaid and did then and there attack and beset the houses and habitations of divers liege subjects of our said Lady the Queen and did then and there force and oblige divers liege subjects of our said Lady the Queen inhabiting and dwelling in such houses and habitations and others of Her Majesty's liege subjects then and there being to march along with and join them the said John Frost Charles Walters John Lovell Richard Benfield John Rees George Turner otherwise called George Cole Zephaniah Williams Edmund Edmunds Jenkin Morgan, Solomon Britan William Jones James Aust John Rees and David Jones and the said other persons so assembled as aforesaid and did then and there by force and violence seize and take divers large quantities of arms to wit one hundred guns and one hundred pistols and other offensive weapons of and from divers liege subjects of our said Lady the Queen and against their will with intent by and with the said last-mentioned arms further to arm themselves and other false traitors in order to attack fight with kill and destroy the soldiers troops and forces of our said Lady the Queen and other her liege and faithful subjects and to raise make and levy insurrection rebellion and war against our said Lady the Queen within this realm and thereby to subvert and destroy the Constitution and Government of this realm as by law established and to alter and change the laws of this realm by force to wit at Newport aforesaid in the county aforesaid and did then and there maliciously and traitorously as such false traitors as last aforesaid on the said fourth day of November in the year aforesaid with force and arms at Newport aforesaid in the county of Monmouth aforesaid together with a great multitude of false traitors whose names are to the said jurors unknown to the number of two thousand and more armed and arrayed in warlike manner that is to say with guns pistols pikes swords clubs bludgeons and other offensive weapons in an hostile manner and warlike array march into and enter the town of Newport in the county aforesaid and did then and there make a forcible violent and warlike attack upon a certain dwelling-house there situate in a certain part of the said town in which said dwelling-house divers of the magistrates and justices of the peace of our said Lady the Queen and divers of the soldiers and constables of our said Lady the Queen were then and there assembled and then and there with great force and violence and in a warlike manner attempted and endeavoured to break and enter and did then and there break and enter the said dwelling-house whilst the said magistrates and justices of the peace and the said soldiers and constables were therein as aforesaid and then and there with great force and violence and in a warlike manner attacked and with the said guns and pistols then and there loaded with gunpowder and bullets fired upon the said magistrates and justices of the peace and the said soldiers and constables so being in the said dwelling-house as aforesaid and then and there wounded and beat divers of the said magistrates and justices of the peace and the said soldiers and constables to wit at Newport aforesaid in the county aforesaid and did then and there maliciously and traitorously attempt and endeavour by force and arms and in a warlike manner to subvert and destroy the Government and Constitution of this realm as by law established in contempt of our said Lady the Queen and her laws to the evil example of all others contrary to the duty of the allegiance of them the said John Frost Charles Walters John Lovell Richard Benfield John Rees George Turner otherwise called George Cole Zephaniah Williams Edmund Edmunds, Jenkin Morgan Solomon Britan William J James Aust John Rees and David Jones ag the form of the statute in such case made provided and against the peace of our said the Queen her crown and dignity.(*a*)

The second count was for levying generally. It charged that the defendant

(*a*) Cf. indictment in *Brandreth's* case, 3 Tr. 758.

as false traitors against our said Lady the Queen heretofore to wit on the fourth day of November in the year aforesaid with force and arms to wit at Newport aforesaid in the county aforesaid together with a great multitude of false traitors whose names are to the said jurors unknown to the number of two thousand and more arrayed and armed in a warlike manner that is to say with guns pistols pikes swords daggers clubs bludgeons and other weapons of offence being then and there unlawfully maliciously and traitorously assembled and gathered together so armed and arrayed as aforesaid against our said Lady the Queen wickedly maliciously and traitorously did levy and make war against our said Lady the Queen within her realm that is to say at Newport aforesaid in the county aforesaid in contempt of our said Lady the Queen and her laws to the evil example of all others contrary to the duty of the allegiance of them the said John Frost Charles Walters John Lovell Richard Benfield John Rees George Turner otherwise called George Cole Zephaniah Williams Edmund Edmunds Jenkin Morgan Solomon Britan William Jones James Aust John Rees and David Jones against the form of the statute in such case made and provided and against the peace of our said Lady the Queen her crown and dignity.

(*Third count*) And the jurors aforesaid upon their oath aforesaid further present that the said John Frost Charles Walters John Lovell Richard Benfield John Rees George Turner otherwise called George Cole Zephaniah Williams Edmund Edmunds Jenkin Morgan Solomon Britan William Jones James Aust John Rees and David Jones being subjects of our said Lady the Queen as false traitors against our said Lady the Queen heretofore to wit on the said fourth day of November in the year aforesaid and on divers other days and times as well before as after with force and arms to wit at Newport aforesaid in the county aforesaid maliciously and traitorously amongst themselves and together with divers other false traitors whose names are to the said jurors unknown did compass imagine invent devise and intend to deprive and depose our said Lady the Queen of and from the style honour and kingly name of the imperial crown of this realm and the said compassing imagination invention device and intention did then and there express utter and declare by divers overt acts and deeds herein-after mentioned that is to say (*First overt act*) In order to fulfil perfect and bring to effect their most evil and wicked treason and treasonable compassing imagination invention device and intention aforesaid they the said John Frost Charles Walters John Lovell Richard Benfield
[illegible] Rees George Turner otherwise called
[illegible]rge Cole Zephaniah Williams Edmund Ed-
[illegible]ds Jenkin Morgan Solomon Britan William
[illegible]s James Aust John Rees and David Jones
[illegible]ch false traitors as last aforesaid on the
[illegible]ourth day of November in the year afore-
[illegible]and on divers other days and times as well
[illegible]re as after with force and arms to wit at
[illegible]port aforesaid in the county aforesaid ma-
[illegible]sly and traitorously did assemble meet
[illegible]nd consult among themselves and together with divers other false traitors whose names are to the said jurors unknown to devise arrange and mature plans and means to subvert and destroy the Constitution and Government of this realm as by law established and to alter and change the laws of this realm by force (*Second overt act*) And further to fulfil perfect and bring into effect their most evil and wicked treason and treasonable compassing imagination invention device and intention aforesaid they the said John Frost Charles Walters John Lovell Richard Benfield John Rees George Turner otherwise called George Cole Zephaniah Williams Edmund Edmunds Jenkin Morgan Solomon Britan William Jones James Aust John Rees and David Jones as such false traitors as last aforesaid on the said fourth day of November in the year aforesaid and on divers other days and times as well before as after with force and arms at Newport aforesaid maliciously and traitorously did assemble meet conspire and consult amongst themselves and together with divers other false traitors whose names are to the jurors unknown to seize and take possession by force of the town of Newport in the county aforesaid and of the post office there and to stop and cut off all communication between Newport aforesaid and the other parts of this kingdom by means of Her Majesty's mails or by the post or otherwise (*Third overt act*) And further to fulfil perfect and bring to effect their most evil and wicked treason and treasonable compassing imagination invention device and intention aforesaid they the said John Frost Charles Walters John Lovell Richard Benfield John Rees George Turner otherwise called George Cole Zephaniah Williams Edmund Edmunds Jenkin Morgan Solomon Britan William Jones James Aust John Rees and David Jones as such false traitors as last aforesaid on the said fourth day of November in the year aforesaid and on divers other days and times as well before as after with force and arms to wit at Newport aforesaid in the county aforesaid maliciously and traitorously did assemble meet conspire consult and agree among themselves and together with divers over false traitors whose names are to the said jurors unknown to attack and fight with the soldiers of our said Lady the Queen then and there being at Newport aforesaid in the county aforesaid and to attack assault and obstruct the magistrates and justices of the peace of our said Lady the Queen then and there being at Newport aforesaid and to stir up raise make and levy insurrection rebellion and war against our said Lady the Queen within this realm and to subvert and destroy the Constitution and Government of this realm as by law established and to alter and change the laws of this realm by force (*Fourth overt act*) And further to fulfil perfect and bring to effect their most evil and wicked treason and treasonable compassing imagination invention device and intention aforesaid they the said John Frost Charles Walters John Lovell Richard Benfield John Rees George Turner otherwise called George Cole Zephaniah Williams Edmund Edmunds Jenkin Morgan Solomon Britan William Jones James Aust John Rees and David Jones as such false traitors as last aforesaid on the

said fourth day of November in the year aforesaid and on divers other days and times as well before as after with force and arms at Newport aforesaid in the county aforesaid maliciously and traitorously did purchase procure provide and have divers large quantities of arms to wit swords pikes guns and pistols and divers large quantities of ammunition to wit gunpowder leaden bullets and slugs with intent therewith to arm and array themselves and divers other false traitors in order to attack fight with kill and destroy the soldiers troops and forces of our said Lady the Queen and other her liege and faithful subjects and to raise make and levy insurrection rebellion and war against our said Lady the Queen within this realm and to subvert and destroy the Constitution and Government of this realm as by law established and to alter and change the laws of this realm by force (*Fifth overt act*) And further to fulfil perfect and bring into effect their most evil and wicked treason and treasonable compassing imagination invention device and intention aforesaid they the said John Frost Charles Walters John Lovell Richard Benfield John Rees George Turner otherwise called George Cole Zephaniah Williams Edmund Edmunds Jenkin Morgan Solomon Britan William Jones James Aust John Rees and David Jones as such false traitors as last aforesaid on the said fourth day of November in the year aforesaid with force and arms at Newport aforesaid in the county aforesaid maliciously and traitorously together with a very great number to wit two thousand and more of the subjects of our said Lady the Queen whose names are to the said jurors unknown then and there assembled with divers offensive weapons to wit guns pistols pikes swords bludgeons sticks and staves did parade and march with great noise and violence and in an hostile and warlike manner in through and along divers public highways towns villages and places in the county aforesaid to wit at Newport aforesaid in the county aforesaid and did then and there attack and beset the houses and habitations of divers liege subjects of our said Lady the Queen and did then and there force and oblige divers liege subjects of our said Lady the Queen inhabiting and dwelling in such houses and habitations and others of Her Majesty's liege subjects then and there being to march along with and join them the said John Frost Charles Walters John Lovell Richard Benfield John Rees George Turner otherwise called George Cole Zephaniah Williams Edmund Edmunds Jenkin Morgan Solomon Britan William Jones James Aust John Rees and David Jones and the said other persons so assembled as aforesaid and did then and there by force and violence seize and take divers large quantities of arms to wit one hundred guns and one hundred pistols and other offensive weapons of and from divers liege subjects of our said Lady the Queen and against their will with intent by and with the said last-mentioned arms further to arm themselves and other false traitors in order to attack fight with kill and destroy the soldiers troops and forces of our said Lady the Queen and other her liege and faithful subjects and to raise make and levy insurrection rebellion and war against our said Lady the Queen within this realm and thereby to subvert and destroy the Constitution and Government of this realm as by law established and to alter and change the laws of this realm by force to wit at Newport aforesaid in the county aforesaid (*Sixth overt act*) And further to fulfil perfect and bring to effect their most evil and wicked treason and treasonable compassing imagination invention device and intention aforesaid they the said John Frost Charles Walters John Lovell Richard Benfield John Rees George Turner otherwise called George Cole Zephaniah Williams Edmunds Edmunds Jenkin Morgan Solomon Britan William Jones James Aust John Rees and David Jones as such false traitors as last aforesaid on the said fourth day of November in the year aforesaid with force and arms at Newport aforesaid in the county of Monmouth aforesaid together with a great multitude of false traitors whose names are to the said jurors unknown to the number of two thousand and more armed and arrayed in warlike manner that is to say with guns pistols pikes swords clubs bludgeons and other offensive weapons maliciously and traitorously did in an hostile manner and warlike array march into and enter the town of Newport in the county aforesaid and then and there make a forcible and violent attack upon a certain dwelling-house there situate in a certain part of the said town in which said dwelling-house divers of the magistrates and justices of the peace of our said Lady the Queen and divers of the soldiers and constables of our said Lady the Queen were then and there assembled and then and there with great force and violence attempted and endeavoured to break and enter and did then and there break and enter the said dwelling-house whilst the said magistrate and justices of the peace and the said soldiers and constables were therein as aforesaid and then and there with great force and violence attacked and with the said guns and pistols then and there loaded with gunpowder and bullets fired upon the said magistrates and justices of the peace and the said soldiers and constables so being in the said dwelling-house as aforesaid and then and there wounded and beat divers of the said magistrates and justices of the peace and the said soldiers and constables to wit at Newport aforesaid in the county aforesaid (*Seventh overt act*) And further to fulfil perfect and bring to effect their most evil and wicked treason and treasonable conspiracy imagination invention device and intention aforesaid they the said John Frost Charles Walters John Lovell Richard Benfield John Rees George Turner otherwise called George Cole Zephaniah Williams Edmund Edmunds Jenkin Morgan Solomon Britan William Jones James Aust John E and David Jones as such false traitors as uforesaid on the said fourth day of Noven in the year aforesaid with force and arms to at Newport aforesaid in the county afores together with a great number of false trai whose names are to the jurors unknown to number of two thousand and more armed arrayed in a warlike manner that is to say w guns pistols pikes swords clubs bludgeons other weapons of offence maliciously and tra

rously did ordain prepare levy and make public war against our said Lady the Queen within this realm in contempt of our said Lady the Queen and her laws to the evil example of all others contrary to the duty of the allegiance of them the said John Frost Charles Walters John Lovell Richard Benfield John Rees George Turner otherwise called George Cole Zephaniah Williams Edmund Edmunds Jenkin Morgan Solomon Britan William Jones James Aust John Rees and David Jones against the form of the statute in such case made and provided and against the peace of our said Lady the Queen her crown and dignity.

The fourth count was for levying war against the Queen to compel her to change her measures. It charged that the defendants—

on the said fourth day of November in the year aforesaid and on divers other days and times as well before as after with force and arms at Newport aforesaid in the county aforesaid maliciously and traitorously amongst themselves and together with divers other false traitors whose names are to the said jurors unknown did compass imagine invent devise and intend to levy war against our said Lady the Queen within this realm in order by force and constraint to compel her to change her measures and counsels and the said last-mentioned compassing imagination invention device and intention did then and there express utter and declare by divers overt acts and deeds herein-after mentioned.

The overt acts were the same as in the last count.

The prisoners, *John Frost, Charles Walters, John Lovell, Richard Benfield, John Rees, George Turner*, otherwise called *George Cole, Zephaniah Williams, Edmund Edmunds, Jenkin Morgan, Solomon Britan, William Jones, James Aust*, being put to the bar and arraigned upon this indictment, severally pleaded Not Guilty.

The counsel for the prisoner *John Frost* having stated that they intended on his behalf to sever in the challenges, and the other prisoners having, in answer to a question from the Court, severally expressed the same intention, the *Attorney General* stated that he should proceed first with the trial of *John Frost*.

(All the prisoners, with the exception of *John Frost*, were removed from the bar.)

Thomas: I am also assistant counsel for Mr. *Frost*.

TINDAL, C.J.: The Court can take no ce of that.(*a*)

The jury panel was called over, and se jurymen who were present answered heir names.

ir *Frederick Pollock* applied to the rt, that in consideration of the probable length of the trial, and in consideration also of the prisoner having been recently unwell, he might be allowed the indulgence of a seat; the application was granted by the Court.

The Clerk of Assize proceeded to call those jurors who had answered to their names upon the first calling over of the panel; and the name of *George Adams*, of Portskewitt, tailor, was called.

Sir *F. Pollock*: Will your Lordships, before that juryman is called, permit me to suggest, that the order in which the panel is presented is apparently alphabetical, and I presume has been arranged by some person in that order industriously. Perhaps your Lordships will think that there is no impropriety in my asking that the jury may be indifferently drawn from those who do appear, by means of a ballot, as is provided expressly in all similar cases. If, my Lord, it had appeared that the names of these jurymen were presented, as in many other instances they are, without reference to any order, so that no objection could be offered to them, I certainly, my Lord, should not have made the application, but at present my humble application is, that your Lordships will direct that their names shall be drawn by ballot, and not drawn and called as they stand upon the list.

Kelly followed: Your Lordships will observe, that the prisoner has no control whatever over the preparing of these lists of the jury from the body of the county. The sheriff, or whoever prepares these lists and summons the jury, might very easily make a selection of persons whose names begin with some of the earliest letters of the alphabet, persons known to entertain particular opinions. Now, my Lord, it is of the greatest importance that the administration of justice, and every part of it, should be entirely above suspicion. It is quite obvious, as the number of challenges to which the prisoner is confined is limited by law, that those challenges would probably be exhausted before the first three or four letters are gone through. The effect, therefore, in cases of this nature, will be substantially to cause every case of this description to be tried by persons whose names begin with some of the earlier letters of the alphabet; and as that would give the individual who has the original preparing of the list the power to select so many persons whose names begin with the earliest letters of the alphabet, as to defeat the prisoner's challenge, it would certainly give a means of doing the greatest and gravest injustice, the mere possibility of which leaves the proceeding open to some suspicion.

My Lords, I do hope that, as this is a matter entirely in your discretion, as it

(*a*) By 7 & 8 Will. 3. c. 3. s. 1, the judge is ired to assign "so many counsel not exing two" as the prisoner shall demand.

must be immaterial to the Law Officers of the Crown whether the whole of the names of the jurors now present are put into a box, and then drawn out one after another by chance, or, whether they are drawn out alphabetically, I hope they will not object to the course we propose. If, however, they should do so, I submit to your Lordships that it is a matter entirely in your discretion; and I do venture to submit very humbly to your Lordships, that you will take that course which will place the administration of justice, entirely beyond the possibility of the remotest suspicion.

Attorney General: My Lords, I shall be very far from questioning the authority of your Lordships to direct the jury to be selected in any manner that in your judgment may appear most conducive to the ends of justice; and if you should be of opinion that in this case, for the first time, the jury ought to be selected by ballot, I will most respectfully acquiesce. It seems to me to be a matter of most perfect indifference, and whatever your Lordships' judgment may be, I shall receive it with entire satisfaction. But at the same time, my Lords, it is my duty to point out to your Lordships that from the 7th of *William* 3. down to the present trial, I believe that this form of proceeding never has been adopted; the course has always been to begin with the name standing first at the top of the list, and to proceed, subject to challenges by the prisoner and by the Crown, till a proper jury was impannelled.

My Lords, these proceedings have been conducted before great and constitutional judges; they have been conducted in cases where the prisoners were defended by advocates of the first eminence, name, and talents, and the rule has come down to your Lordships, such as I venture to submit to you.

Now, the ground upon which it is said that there ought to be now this novel mode of proceeding in cases of high treason is this, that this jury list is alphabetically arranged. My Lord, I must say that, in my mind, that is the very reason why in this case there is less necessity for proceeding by ballot than in the usual case. I never saw this jury list till I entered the walls of this Court, nor was I aware that it had been arranged alphabetically, till my learned friend, Sir *F. Pollock*, pointed out that circumstance, which is undoubtedly true. It is not strictly alphabetical, but that is the principle upon which the names appear to have been arranged. But I own, my Lord, it appears to me that that can be no reason at all for departing from the usual course, because this shows that instead of there being any selection on the part of the sheriff, he really has submitted to a mode of arranging the names, which is casual. My Lord, it must be supposed that the sheriff has done his duty; there is no challenge to the array, and it must be supposed that this list is impartially returned; and therefore the question is, is there now, by reason of there being an alphabetical arrangement, to be a departure from the usual practice? If your Lordships should think that it will in the slightest degree promote, not only a fair and impartial administration of justice, but an administration of justice above all suspicion; if you should think that any suspicion might attach to this trial if we were to proceed in the usual manner; I concur with the counsel for the prisoner, and pray that there may be a departure from the common rule. But unless there be some well-considered reason for that departure, departing from it in this instance may lead to inconvenience which we cannot at present forsee; we should then be travelling out of the common course, and we know not what deviations may afterwards be proposed.

Sir *F. Pollock:* Will your Lordship permit me to state, that as far as my memory serves me, and I have looked over some of the former panels, I find none of the panels that I have looked at returned alphabetically. I am not prepared to say that that has never been so, because my impression is (and I feel myself bound to state to your Lordship accurately that which I profess to state), that on one occasion, but I think upon one only of the many reports of High Treason that I have before me, was there a list returned alphabetically.

Tindal, C.J.: What occasion was that?

Sir *F. Pollock:* I am not able to state from memory when that was.

Solicitor General: It is *Brandreth's*,(*a*) if it is any.

Sir *F. Pollock:* I believe my learned friend is right.

Tindal, C.J.: The Derby case?

Sir *F. Pollock:* It was, my Lord; that was in October 1817.

Williams, J.: The persons called upon are given in the book, and their names do not appear to follow alphabetically.

Sir *F. Pollock:* Then my learned fri is wrong in that instance; but in all instances that I have looked at now si this application has been made to y Lordships, from the persons objected and those sworn as jurors, it is quite pl that the panel was not arranged alp betically. I presume, therefore, it arranged according to some casual or

(*a*) 32 St. Tr. 755.

the under-sheriff returning the jury to the Court probably by lot, or in some other way, and not putting them into any regular form. In *Hardy's* case,(*a*) in *Horne Tooke's* case,(*b*) and in several others the panel does not appear to have been alphabetical. In *Crossfield's* case,(*c*) for instance, the first juryman sworn is *Hilton Ray*, the next is *John Anderson*, and the third challenged, *John Vincent Gandolfi*; still, my Lord, when I profess to state anything upon a matter of this importance, I feel bound to admit all that I am aware of——

PARKE, B.: I rather think, Sir *Frederick Pollock*, it is the course at the Old Bailey always to return to the different sessions the list alphabetically arranged.

Sir *F. Pollock*: I do not know, my Lord, what the practice is there, but allow me to point this out: we have here a list of three hundred and eighteen jurors returned; by going through the panel, I perceive that the number struck out is between seventy and eighty. There are, therefore, left two hundred and thirty or two hundred and forty, and your Lordships must perceive that the prisoner, with his thirty-five challenges without cause, and a very small number of challenges with cause, and with the twelve who may be sworn, could hardly dispose of more than fifty or sixty of the panel; the consequence of which would infallibly be, that the court could hardly get through more than a certain very small portion of the alphabet; certainly not so much as half. Now, my Lord, is this to be the course? Is the sheriff to return the lists alphabetically? the consequence of which is, that every gentleman in the county bound to serve upon juries, whose initial stands low in the alphabet, may be quite satisfied that he will not be required to serve; or is it to be, that sometimes the sheriff is to begin with the letter A, and sometimes with the letter B, and sometimes with the letter C, so as to cast upon those whose names begin with the later letters of the alphabet a share of the burden? The freeholders of the county whose names begin with the early letters of the alphabet have a right to say, "The whole burden is not to be cast upon us; let those whose names begin with the later letters be ed upon to perform this very painful onerous duty." My humble applica- to your Lordships is, that you will ct the jury to be drawn by ballot. I I understand, that preparations have n made with a view to give effect to h a direction of your Lordships, if you should be pleased, in the view you take of the subject, to make such an order. Among the cases that my learned friends have looked at since I have been addressing your Lordships, I am told that they cannot find any instance where a jury has been returned alphabetically; the consequence is, that there has been upon this occasion an artificial and not a natural arrangement. I seek to disturb that, and that the jury who shall try the prisoner may be selected indifferently, and without any reference to the views and caprice of any one; and I trust that your Lordships will think, that in that way alone can full and satisfactory confidence be given to a proceeding so important and so momentous as the present.

(*Their Lordships consulted together for a few minutes.*)

TINDAL, C.J.: If this application had been opposed on the part of the Crown, I, as one sitting here, should not have conceded to the objection; because I think, so far from being a real objection on the part of the prisoner, it is an advantage to him that the names are arranged as they now stand. The sheriff, in ordinary cases, has a right, taking the lists of freeholders that are returned to him from the different parishes fairly and impartially, to put the names down in any order that he thinks fit; and the usual and ordinary course in criminal courts is, that the names of the jurors are called as they stand in that list. Surely, then, it is anything but a disadvantage to the prisoner, that instead of the names occurring in the list, and being called as the sheriff has put them down, and which rests with himself, he has arranged them in a manner that you can hardly upon any calculation of chances say, that the men who are placed upon the different lists, their names beginning with different letters of the alphabet, are men selected for any particular purpose; but, at the same time, as there is no opposition made by the *Attorney General*, I think it would be better to allow, for this time, the names to be called by ballot.(*a*)

The jurors who had answered to their names were again called over.

On *Edward Davies*, of Tintern Parva, farmer, being called——

Attorney General: I challenge him on the part of the Crown.

Sir *F. Pollock*: I am quite sure that your Lordships will not be surprised at my objection to peremptory challenges on the part of the Crown. My Lord, I am quite aware of the history of this question; but inasmuch as the court is now called upon, for the first time, to put a judicial con-

(*a*) 24 St. Tr. 199.
(*b*) 25 St. Tr. 1.
(*c*) 26 St. Tr. 1.

(*a*) See *Mansel's* case, Dears. & B. C.C. 375.

struction upon a new Act of Parliament,(a) I should be wanting certainly, I think, in respect even to your Lordships, but undoubtedly in what I owe to the prisoner at the bar, if I did not call your Lordship's attention, and I mean to do so very shortly, to the position in which this question has stood on former occasions. My Lord, the present statute is not the statute of *Edward* 1. The privilege of peremptory challenges given to the prisoner, but denied to the Crown, was formerly by the statute 33rd of *Edward* 1. c. 4., which, I believe, has been re-enacted word for word, with the exception of one syllable—in substance I must admit that it has been re-enacted—by the 6th of *George* 4. c. 50. s. 29. The words of that statute are these:—

"And be it further enacted, That in all inquests to be taken before any of the courts herein-before mentioned, wherein the King is a party, howsoever it be, notwithstanding it be alleged by them that sue for the King, that the jurors of those inquests, or some of them, be not indifferent for the King, yet such inquests shall not remain untaken for that cause; but if they that sue for the King will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court, and it shall be proceeded to the taking of the same inquisitions, as it shall be found if the challenges be true or not after the discretion of the court."

I am aware that for a long series of years it has been considered to be the practice,(b) and therefore to some extent the law, that the Crown might postpone the cause to be assigned, until the panel is gone through. The effect of this upon a panel like the present must, I think, alarm every person who supposes there is any safety in the statute of *Edward*, or any benefit to the subject in the continuation of the enactments of that statute by the Act commonly called "Peel's Jury Act." At a time when a smaller number of juries were wont to be on occasions like the present, when the panel might not exceed five or six complete juries, the postponement of the cause to be assigned by the Crown might have very little influence.

My Lords, this is no question connected with anything but the profession of which I have the honour to be a member in common with your Lordships; and I beg to say, that from the earliest time that I have ever considered the question, I have had but one opinion upon it; and I feel it to be my imperative duty, at the first moment that an opportunity presents itself, to call the attention of the court to the monstrous injustice that may be perpetrated if this statute, recently passed, is to receive the same construction that the statute received in times of old.

Look, my Lords, at the present panel; there are to be drawn from the box two hundred and forty names, at least as many as that. The challenges for cause, coupled with the thirty-five peremptory challenges to which the prisoner is restricted by the law, can hardly be expected to exceed the number of fifty, and deducting those fifty from the two hundred and forty names in that box, there will remain one hundred and ninety jurors, and the Crown will have a right, by postponing its challenge for cause, to select precisely the twelve individuals out of the one hundred and ninety, that it may be thought most convenient (by whatever name the proceeding is to be called, I presume I may call it convenient) for the administration of justice to select. The Law Officers of the Crown will have a right out of that one hundred and ninety, actually to select the identical twelve that they may choose to fix upon. If that does not present the means of packing a jury, I own, my Lord, I do not know what does. If the Crown should at once take the one hundred and ninety names and say, "The prisoner's challenges are exhausted"—(he may challenge indeed for cause, if any cause can be shown)—"and we will have the trial by the twelve individuals that we fix upon out of the one hundred and ninety;" that would be a monstrous injustice, but there is no escaping that conclusion; the prisoner has no means, none whatever, of escaping it; and assuming that this may be done (and the law of England for this purpose knows no distinction between what may be done, and what on any occasion a person shall choose actually to do), I say that this does really amount not only to a practical repeal of the statute, but it is giving to the Crown the power of packing a jury, and trying the cause by any twelve persons out of the one hundred and ninety that they think fit.

This appeared so monstrous to one learned judge that he considered that was in the discretion of the Court to interfere with it if the Court thought right do so; and accordingly at the trial *Horne Tooke*,(a) in the year 1794, I find the following expression used by Lord Ch Justice *Eyre*, in page 25; it occurs while the panel was being called over

(a) 6 Geo. 4. c. 50.

(b) So stated in Staunford, P.C. lib. 3, c. 7, fo. 162, 163. See also *R* v. *Parry*, 6 C. & P. 836; *Mansel's* case (*ubi sup.*); 4 Bla. Com. 353; 2 Hawk. P.C. c. 43, s. 3.

(a) 25 St. Tr. 2.

the purpose of forming a jury. Mr. *Tooke*, I observe, himself took that objection; he says:—

"That the Crown shall give their cause of challenge before an infirm juryman shall be taken."

They had gone through the panel then, and it was objected that the Crown ought to assign its cause, and that the prisoner ought not to be put to make his challenge until the Crown had challenged for cause. Lord Chief Justice *Eyre* says this:—

"Your counsel advised you very properly not to resist the challenges for the Crown in the course in which those challenges have been taken. As far as our legal history affords us any information upon the subject, the course is a clear one. The Crown has no peremptory challenge; but the course is, that the Crown may challenge as the names are called over, and is not bound to show the cause of the challenge until the panel is gone through. That is the course of proceeding which is now so established that we must take it to be the law of the land. At the same time, I feel that the circumstance, which is become absolutely necessary, of making the panels vastly more numerous than they were in ancient times, might give to the Crown an improper advantage, arising out of that rule. And wherever we shall see that improper advantage attempted to be taken, it will be for the serious consideration of that Court whether they will not put it into some course to prevent that advantage being taken. I do not perceive at present that there is any complaint that an ill-use has been made of this power in this instance. How many have been challenged on the part of the Crown?

Shelton, Clerk of the Arraigns: Seven.

EYRE, C.J.: It does not appear to me at present that an improper advantage has been taken.

Tooke: Seven is a majority of my jury.

EYRE, C.J.: It does not appear to me at present that an improper advantage has been taken by the Crown, therefore we must see what the rule is. The rule is, that when the panel is gone through, if there be not a sufficient number left to serve upon the jury, the Crown is to show the cause of its challenge. The panel is gone through now, as I take it; we reserved two or three cases of persons who had desired to be excused; their excuse was of a kind which hardly called upon us, in strict justice, to dispense with their service; at the same time, if there were enough upon the panel to serve, the Court were inclined to listen to that excuse. The question now is, whether they are to be d upon to serve before the Crown shall be o assign the causes of its challenges."

h the utmost deference to your ships, I conceive that this practice t in at a time when there was a de- nce paid to the Crown upon points of description, which the law and the iciples of the Constitution did not war- , and which the mode of trial by as settled by this Act of Parliament, was actually intended to prevent. My Lord, I humbly submit that this is a mode practically of evading, if not absolutely of repealing, the effect of that wholesome statute of *Edward* 1., now re-enacted in the 29th section of *Peel's* Act.

I am far from being disposed to go over the various matters which, in the history of our law, must be present to your Lordships' minds, where the Crown has had an advantage time after time given to it, though it is difficult to know why. Your Lordships know how, at various times successively, the subject has at last been placed upon an equal footing in point of right in various respects; the means of getting witnesses; the swearing of those witnesses; the allowing them to be called; in all which matters the Crown had at one time an advantage by the practice of the Court—a most unjust and intolerable practice, founded upon no law. I forbear to remind your Lordships of these matters, because they have now passed by; but they arose at a period when it seems to have been thought that, because the name of the Sovereign appeared upon the record, the Sovereign had some personal or public interest in anything but the justice of the case. Your Lordships know that the very foundation of the practice of counsel not being allowed to appear on behalf of a prisoner was this: that by the allegiance which a man owes to the Crown, it was thought he ought not to appear and plead the cause of any person against that Crown, as if the Crown had an interest in the guilt of the accused, and had not the deepest interest in making out that the party was innocent.

As I stated to your Lordships in the outset, I propose to make no long argument upon this point; but I should forget that those opinions and those views which one at least of the gentlemen round the table knows I have long entertained on this subject, if I did not, in the shortest, but, at the same time, in the clearest way, as this Act of Parliament, passed only in the year 1825, is for the first time to receive a judicial construction, call upon your Lordships to say that the ancient practice was founded in a species of courtesy and deference to the name of the Sovereign, which it is no part of the prerogative to demand, which it is no part of sound loyalty to yield; that it has been continued from time to time from a deference, which is not a constitutional deference, for, in all respects, it is of importance for the Crown to prove the innocence of the subject of the Crown that may be accused.

I submit to your Lordships, therefore, that the ancient practice that did prevail was founded upon no constitutional law, but is in fact, and would be, if it were

carried out as it might be, a practical repeal of the Act of Parliament that has been considered to be the law of the land ever since the 33rd year of the reign of *Edward* 1.; and I submit, therefore, that your Lordships ought now to put that construction upon it, which in my humble judgment ought to have been put upon it from the beginning, that the Crown cannot challenge and say that they have a cause that they will produce by-and-by. I know of no ground upon which, either in principle or upon the words of the statute, they can contend for that; I am aware that a practice has crept up—I conceive that practice not to be well-founded, or one of the judges of the land would not have thought that he had a right to control it; and I trust, therefore, that your Lordships will call upon the Crown to disclose what is the cause of challenge against the juryman now in Court.

[*Kelly* followed.]

My Lords, I can hardly believe that in a court of justice at the present time, now when the point is brought forward, and made plain and intelligible to those who hear it discussed, I can hardly conceive that the Officers of the Crown will stand up and defend so monstrous and unjust a claim. It is in vain to say, when we look back to the history of the statute book, and the State trials, that we are not to argue against the exercise of power from its possible abuse. We have seen that power in high treason cases abused to the shedding of innocent blood to an extent that it is frightful even to contemplate. I hope, therefore, that your Lordships will look to the terms of the statute, and see whether there is anything in the Act of Parliament, the 33rd of *Edward* 1., or in any other Act of Parliament that my learned friend can refer to, which gives to the Crown the right substantially of challenging peremptorily any number that they think fit, and deferring to assign cause until any number of jurymen that they may choose to fix upon shall have passed under review, and then at the end of the panel exercising the right of challenging for cause. My Lords, unless some such right can be found in the statute, unless there be some such direct authority, not simply calling upon you not to exercise a discretion, but imposing it upon you as an act of duty to sanction this claim, I feel persuaded that your Lordships will not give way to it; and I feel that the observations of Lord Chief Justice *Eyre*, to which my learned friend Sir *F. Pollock* has adverted, are perfectly decisive upon this question; they are decisive to show that it is, after all, merely a discretion to be exercised by the Court in a matter of practice, and that it is not a rule of law to which your Lordships as judges are bound to submit.

My Lords, I know that your Lordships will pardon me if I have used any expression too strong; it is because I feel that this is a constitutional point of the highest importance; it is of importance now and in all time to come; but it will be more especially of importance, if we should ever see the time, when the power exercised by my learned friend should be placed in other hands, where the intention to execute justice may not exist; and it is under these circumstances that I submit to your Lordships that the Crown ought not to be permitted to make this peremptory challenge, which I contend it is in substance, but that your Lordships will call upon the Crown to state the matter of their challenge, and then, in the words of the statute, proceed to try whether it be true or not, after your discretion.

There is one point more, which my learned friend has desired I should suggest to your Lordships. I observed, and it no doubt has been observed by your Lordships and the officers of the Court, that my learned friend did not challenge till after the book was put into the hands of the juror; that, I submit, is too late.

Solicitor General: The book was placed in his hands for him to be sworn upon the *voir dire*.

Sir *F. Pollock:* No, he had laid down the book after having been sworn upon the *voir dire*.

Kelly: With reference to the matter of fact, I dare say your Lordships will be able to dispose of that; I do not state of my own knowledge the fact, for I will not undertake to say I noticed that part of the proceeding; but what I am informed is the fact is this, the gentleman having been called, having taken oath, and having stated his qualification upon the *voir dire*, had laid down the book, and had again taken up the book at the instance of the officer of the Court in order to be sworn as a juryman. If that be the fact, that is another ground upon which in this particular case the Crown cannot challenge the juryman; and, therefore, whatever may be your Lordships' decision upon the main point, I submit that your decision in the present case must be, that the Crown has no right to challenge, and I find that laid dow[n] the case of *Christopher Layer*.(*a*) In [t] case it is stated, that—

"upon a person of the name of Thomas H being about to be sworn as a juryman prisoner challenged him.

"*Pengelly:* I do not know this metho proceeding; if the prisoner makes any c lenge, it must be before he comes to the boo

(*a*) 25 St. Tr. 135.