1923

Challenges to the Array

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MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW SCHOOL OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 50 CENTS PER NUMBER

NOTE AND COMMENT

CHALLENGES TO THE ARRAY.—Trial by jury demands impartial jurors as the indispensable basis for public confidence. And the first requisite for obtaining impartiality is indifference on the part of those who select the jury. This was fully recognized at the common law, and ever since the days when jurors ceased to be witnesses and became triers of facts, it was a good objection to the entire panel that the sheriff was not indifferent between the parties in the selection and summoning of the jury. Prejudice on the part of individual jurors could be met by challenges to the polls, but when favor lurked behind the juror in the officer who selected and summoned him, insidiously cutting at the very root of the jury as an impartial tribunal, the whole panel was infected with a fatal infirmity.

The remedy of a challenge to the array has always been reserved for those serious offenses against fairness which affect the integrity of the jury itself. In *Commonwealth v. Walsh* (1878), 124 Mass. 32, 35, Chief Justice Gray said: "A challenge to the array * * * appears, at common law, to have been allowed only on account of the partiality or default of the sheriff

or other officer who made the return. All the cases referred to by counsel were of that character. If the sheriff returned a juror on the nomination of one of the parties, or knowingly returned a person more favorable to one party than to the other, it showed partiality, or, as it was called, unindifferency, on the part of the sheriff, which was a ground for challenging the array." Just what was meant by the term "default" as distinguished from "partiality" is somewhat obscure, for while all the common law cases use both words in the alternative, they do not attempt a differentiation. But it seems probable that the default referred to was primarily some departure from proper legal method tending to produce that partiality which such a challenge was designed to prevent, so that the two grounds are really one,—prejudicial bias, actual or possible, in the selection of the jury. This is the effect of the various opinions in the great English case of *O'Connell v. The Queen* (1844), 11 Cl. & Fin. 155, where the House of Lords gave the subject a most thorough examination. In that case it was admitted that 59 out of some 700 names which should have appeared on the general jury list prepared by the Recorder of the city of Dublin were fraudulently omitted, and while the majority of the Lords held that no challenge to the array would lie because that remedy was confined to the acts of the sheriff himself, yet Lords Denman, Campbell, and Coleridge vigorously contended that when any of the ancient duties of the sheriff were by statute given to other officers, the ancient remedy should be deemed to apply to the statutory successors of the sheriff. If that were true, they argued, the challenge to the array ought to have been sustained, not because there were names omitted but because they were *fraudulently* omitted. This application of the remedy to all officers engaged in selecting and summoning the jury has the general approval of modern courts. *People v. Harding* (1884), 53 Mich. 48.

The new statute creating the Recorder's Court of the City of Detroit has been the occasion for bringing up the subject of challenges to the array in two recent cases,—*People v. McNutt* (1922), 220 Mich. 620, and *People v. Cathey* (1922), 220 Mich. 628. A special board of jury commissioners was created to provide juries for that court, and the constitutionality of the statute was sought to be questioned by a challenge to the array of jurors prepared by that board. A majority of the court held that the question could not be so raised because the commissioners were *de facto* officers acting under color of office, and their authority could not be collaterally attacked. Many modern cases are cited applying this principle to juries empanelled by *de facto* officers. Cases might have been added showing that such has been the rule of the common law for several centuries: *Hoare v. Broom* (1595), Croke's Eliz. 369, where the sheriff returned an array after he had received a writ of discharge from office, and *Anonymous* (1689), 2 Vent. 58, where the return was made by a sheriff who had never taken the oath of office.

The result here reached depends upon the doctrine that there can be a *de facto* officer without a *de jure* office, for the objection to the jury commission of the Recorder's Court went to the validity of the office itself. In Michigan the principle has been recently approved, upon very careful consideration, that a *de jure* office is not necessary in order to have a *de*

facto officer. *Gildemeister v. Lindsay* (1920), 212 Mich. 299. In other states there is an irreconcilable conflict. In accord with the Michigan view are *State v. Poulin* (1909), 105 Me. 229; *State v. Gardner* (1896), 54 Ohio St. 24; *State v. Bailey* (1908), 106 Minn. 138; *State v. Carroll* (1871), 38 Conn. 449; *Lang v. Bayonne* (1906), 74 N. J. L. 455 To the contrary are *King Lumber Co. v. Crow* (1908), 155 Ala. 504; *Norton v. Shelby County* (1886), 118 U. S. 425; *Buck v. Eureka* (1895), 109 Cal. 504; *In re Norton* (1902), 64 Kan. 842; *Herrington v. State* (1898), 103 Ga. 318; *Matter of Quinn* (1897), 152 N. Y. 89; *State v. O'Brien* (1878), 68 Mo. 153.

But even though the doctrine of a *de facto* officer could not be resorted to in support of a jury panel selected by an unconstitutional commission, the use of the challenge to the array to bring up a technical objection of this kind might well be questioned as contrary to the common law purpose of that remedy. That purpose was to prevent a trial by a packed jury. American cases where such challenges have been sustained on common law grounds are almost entirely cases of "unindifference" on the part of those drawing and summoning juries. *State v. Powers* (1896), 136 Mo. 194 (sheriff was prosecuting witness and selected jurors in his own favor); *Vanauken v. Beemer* (1817), 4 N. J. L. 364 (constable was related to plaintiff); *Woods v. Rowan* (1809), 5 Johns. (N. Y.) 133 (sheriff as plaintiff summoned the jury); *Munshower v. Patton* (1823), 10 Serg. & Rawle (Pa.) 334 (sheriff was a brother of defendant); *Vermont Box Co. v. Hanks* (Vt., 1917), 102 Atl. 91 (defendant participated with the sheriff in drawing the jury panel). In *Conkey v. Northern Bank* (1857), 6 Wis. 447, the challenge was overruled on the ground that no partiality of the sheriff was shown; and in *Ullman v. State* (1905), 124 Wis. 602, departures from the statute as to method of empanelling were held not grounds for challenge to the array when they did not tend to prejudice the complaining party. In *People v. MacGregor* (1914), 178 Mich. 436, where in many townships the number of jurors returned was short, in many others the number returned was excessive, one township made no return, several made improperly executed returns, and in only a small minority of the townships was the statute followed, the challenge to the array was, nevertheless, held properly overruled. So in *Niles v. Circuit Judge* (1894), 102 Mich. 328, where the assessment rolls for 1892 were used instead of those for 1893, this was held to be no ground for challenge to the array where it appeared that a majority of the jurors actually summoned were eligible. Such a case as *Gladden v. State* (1869), 13 Fla. 623, holding that the slightest departure from the statutory method of empanelling the jury was ground for a challenge to the array, is a subject of almost universal criticism. See THOMPSON & MERRIAM ON JURIES, § 47, note.

The inappropriateness of a challenge to the array for any purpose other than maintaining the purity of the jury as an impartial tribunal of justice is specifically recognized by the statutes of many states. Thus only "*material* departures" from the forms prescribed by statute are authorized grounds for such a challenge, *Buford & Co. v. McGetshie* (1882), 60 Ia. 298; and other statutes add the further requirement, as an additional precaution, that it must be such as to prejudice the party. *People v. Burgess* (1897), 153

N. Y. 561; *Wadsworth v. State* (1913), 9 Okla. Cr. 84. A material departure is held to be such as to deprive a party of the opportunity to secure an impartial jury. *People v. Davis* (1887), 73 Cal. 355; *People v. Sowell* (1904), 145 Cal. 292. In Texas such a challenge can never be used except where the officer summoning the jury has corruptly summoned persons known to be prejudiced against the party. *Forrester v. State* (1914), 73 Tex. Cr. 61.

A challenge to the array on technical grounds not affecting in any way the quality of the jury as an impartial trier of facts, is entitled to little consideration at the hands of the courts. It is merely an impediment thrown in the path of justice. As was said by Judge Davis in *Thompson v. People* (1875), 6 Hun (N. Y.) 139, when the disqualification of the jury commissioner was urged on a challenge to the array. "There was, of course, nothing meritorious in the challenge, because it could not make the slightest difference to the prisoners whether the panel of jurors by whom they were about to be tried was selected from lists prepared by one or the other of the persons named. The qualifications of the jurors could neither be increased nor diminished by the officer who selected them, and no injury, in fact, could accrue to the prisoners whether the commissioner was one acting both *de facto* and *de jure*, or only *de facto;* and courts would not be justified, in any case, in arresting a trial for the purpose of settling a question so wholly immaterial in any valuable consequence to the accused." E. R. S.

CONSTITUTIONAL LAW—POLICE POWER, REGULATION, AND CONFISCATION. —"Whether the power be taken away directly, or be deadened and atrophied in its action by adverse criticism and demagogic clamor, when the judiciary no longer feel at liberty to construe the provisions of the fundamental law 'in the light of reason,' constitutional government, in the sense in which it has been understood for a century and a half, will be at an end, and the doctrine of the police power will have been swallowed up in the capacious maw of unrestrained democracy." 27 HARV. L. REV. 316. Mr. Wickersham penned this warning during the period when the swell of socialized state legislation, under the cloak of the police power, met the ready approval of the United States Supreme Court. Those vested interests, whose rights were encroached upon, probably felt that the police power was all that the spleen of Dr. Johnson expressed toward patriotism. Indeed, the views found in some of the opinions may have seemed to justify apprehension of actual confiscation under that indefinite power. See, in particular, *Noble State Bank v. Haskell*, 219 U. S. 104, 110, 111, and the dissenting opinion of Mr. Justice Holmes in *Lochner v. New York*, 198 U. S. 45, 76. Where the line would be drawn between the regulation of property rights and the taking thereof remained in doubt. In a recent decision the Supreme Court appears to have "pricked out" a point beyond which the power to regulate cannot go.

This case involved the constitutionality of the Kohler Act (1921), P. L. 1198, by which the Pennsylvania legislature made it unlawful to mine anthracite coal in such a way as to cause a subsidence of any public building or structure, street, road, bridge, or other passage way, and among other