ditions of the rule, always and conclusively prove *reasonableness* as a quality of a sincere belief in the cause of action? It must be admitted that some cases so hold; some, however, do not. With all deference and presumptiously, perhaps, my mind would not, philosophically considering it, admit the theoretical soundness established by an affirmative answer to this question; but aside from this, as a legal proposition, the answer must be in the negative for the reasons already stated, namely, that the other facts may be of a character to demonstrate conclusively that notwithstanding the advice of counsel the prosecutor was unreasonable in entertaining such a belief. This case fully illustrates this, and the conduct and bearing of the defendant, who instigated and managed the attachment suit, shown in his demeanor, on the witness stand as elsewhere, from the beginning of that suit, plainly indicated that it was he who contrived this scheme to circumvent Brewer and force him to accept his own terms, and that he pursued it with a most reckless energy that needed no advice of counsel to support or stimulate it; and it may well be doubted if it could have tolerated any advice of counsel which would have checked it.

There was no dispute whatever about the facts bearing on the grounds of the attachment. The question of reasonable belief depended wholly on undisputed facts, and was properly determined as a question of law. There was nothing the matter with or suspicious about the Richardson & May mortgage. It was the same as that of the year before. Defendants knew it had been given, and both sides believed it had been properly executed and registered when the agreement about which the controversy arose was made. The accidental circumstance that it had not been properly executed did not invalidate it, nor make its proposed completion a ground to excite reasonable belief that it was fraudulent, or, in the language of the attachment affidavit, that Brewer "was about to fraudulently convey his property." The defendants knew as well as anybody that this mortgage was not fraudulent. They take such mortgages in their own business, and wanted one just like it from Brewer on a part of the same place, and his refusal to give it was their chief cause of complaint. It was unreasonable, then, to believe it a good ground of attachment that Brewer was about to complete the Richardson & May mortgage, and no advice of counsel on the facts of this case could make it more reasonable to entertain such a belief. The alleged misrepresentations, deceit, and bad faith in refusing to carry out his agreement with defendants, did not subject Brewer to attachment, and no reasonable man, with or without the advice of counsel, could say that the alleged deceit furnished any support for the affidavit that Brewer was "about to fraudulently convey his property," which was an entirely different thing, and had no connection with the deceit. The court having determined that this was unreasonable belief, as a matter of law, it had no occasion to submit the question of probable cause to the jury, there being no disputed fact bearing on that question.

The charge is also supported by the case of *Stewart* v. *Sonneborn*, 98 U. S. 187. There was no dispute here about the belief of the attaching plaintiffs as to their cause of action, nor as to the facts on which they formed their belief. They admitted that they based the affidavit alone on the Richardson & May mortgage, and the only question was whether the belief in it as a cause of action was reasonable; wherefore the remark of the court in that case, that the defendant's "belief was always a question for the jury," has no application here. It is conceded that they had a belief that the Richardson & May conveyance would be, under the circumstances, "a fraudulent conveyance," but this was held by the court to be unreasonable. The instruction to the jury in that case on the subject of the advice of counsel, for the refusal of which the court below was reversed, treated the advice as belonging to the issue of malice. *Stewart* v. *Sonneborn*, *supra*, 196.

The charge is also supported by the case of *White* v. *Nicholls*, 3 How. 266. It is true that was not a case of malicious prosecution, but of libel, in which the defense was a privileged communication. But the principle seems the same, and the method of submitting the question of malice to the jury strikingly analogous, if we place the advice of counsel on the same footing as a privileged communication in the law of libel was there placed. The analogy appeared to me so complete that the charge under review is somewhat a paraphrase of the opinion of the supreme court in the libel case. At all events, the result of the application of the principle of that case to this question was so entirely satisfactory that the case gave me the most thorough confidence in the correctness of the charge, and determined its adoption in a perplexing state of mind as to the conflict and confusion of authority. *White* v. *Nicholls*, 3 How. 266, as reported in the original edition; S. C. as reported in Law Pub. Co. Ed.

This treatment of advice of counsel, in suits for malicious prosecution, removes the great injustice of permitting it to become an impregnable fortress behind which willful injury finds perfect immunity from redress. The ordinary remedies of the law afford abundant means for the collection of debts or breaches of contract, and those which are extraordinary, while they are not to be illiberally treated, should be confined to cases wherein they are applicable, and not extended by greed to those not included by them. They are harsh at best; irreparable injury may often result from their abuse, and the temptation to resort to them in unauthorized cases can only be restrained by the courts holding parties to their legal responsibility, however willing their lawyers may be to shield them by the "advice of counsel," and share with them the product of claims that are saved by being "secured" by such illegal methods.

The next ground of the motion for a new trial relates to the juror Gray. It having been pressed with great zeal in exhaustive and able arguments, and being a matter of serious importance in its chal-

lenge of the whole practice of the court in the matter of impaneling its juries, and involving that practice in much doubt and confusion, by reason of a want of congressional legislation for its specific regulation, I have taken the trouble of going over the authorities which should govern the state and federal practice to see if our method of impaneling a jury should be hereafter followed, or some other mode adopted, and I find that substantially it now conforms to the requirements of the law, and is supported by the authorities.

It is brought to the attention of the court by an affidavit signed "JAMES his X mark. GRAY, Sr.," in which affiant swears "that James Gray, Jr., who served upon the jury in the above cause, * * * is a son of his," and less than 21 years of age, and neither a householder nor freeholder, "and has lived with and been a member of affiant's family ever since he was born, on March 21, 1863." Another affidavit is also filed, showing that said juror has not the property qualification necessary for a juror in Tennessee. Defendants and their counsel severally make affidavits, which are on file, that until the time of trial they did not know this juror, and "had no knowledge that he was a minor under 21 years of age, and that he was no householder or freeholder, until after the jury had returned their verdict." The defendant Booker also swears that he verily believes a fair trial was not had because Gray "was not a good and lawful juror, and did not possess the qualifications required by law; * * * that he was informed and believed that, under the federal court practice in selecting jurors, the members of the jury which were offered in open court to try said cause had been selected as prescribed by the acts of congress; and that the qualification of all said jurors had been declared and ascertained by the court."

The records of the court show that on November 2, 1883, there personally appeared in open court the clerk and jury commissioner, who were severally sworn to the faithful discharge of their duties, "and thereupon the said clerk and the said commissioner did then in open court each place one name in a box alternately of persons possessing the qualifications prescribed for jurors in the courts of the United States by section 800 of the Revised Statutes, until 365 such names were placed in said box. Whereupon the said box so containing the said names having been presented to the court, it is hereby ordered by the court that 30 such names be drawn from said box," and thereupon 30 such names were drawn from said box, as follows: —that of *James Gray* being one; upon which the court orders the issuance by the clerk of the writ of *venire facias*, returnable to the first day of the November term. Mr. Gray's acknowledgment of service upon him of the *venire* is signed "JAS. M. GRAY." On November 26, 1883, the first day of the term, the record recites that "the *venire facias* for jurors was this day called, under the direction of the court,

when the following named persons appeared and answered to their names and were duly sworn, elected, and impaneled as jurors," the name James Gray being in the list of 12 names there set out, and that certain persons named in the *venire* were held as supernumeraries, certain jurors being excused. On December 5, 1883, the tenth day of the term, this suit was called for trial, it having been on the original call of the law docket set for trial on said day, when the record shows the following: "In this cause come the parties by their respective attorneys, and come also a jury of good and lawful men, to-wit, * * * James Gray, * * * who were duly elected, tried, and sworn well and truly to try the issues joined herein," etc.; the panel being composed of the identical 12 men impaneled the first day of the term, except that a supernumerary had been substituted in place of one on the regular panel, why or whether because of challenge the record does not disclose. The verdict as returned by the jury at the conclusion of the trial, and on file in the cause, is signed by each of the 12 jurors, Gray's signature being "JAS. M. T. GRAY," and the records in the clerk's office show that in his affidavits for jury-fees this juror the first time signed his name "JAS. GRAY," the other three times his signature being "JAS. M. T. GRAY." A corresponding discrepancy exists on the marshal's pay-rolls.

The act of congress prescribing the manner of drawing jurors in courts of the United States provides "that all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing at the time of each drawing the names of not less than three hundred persons possessing the qualifications prescribed in section 800 of the Revised Statutes, which names shall have been placed therein by the clerk of such court, and a commissioner to be appointed by the judge thereof," etc. Act June 30, 1879, (21 St. at Large, 43,) Supp. to Rev. St. 497, 498. Section 800 of the Revised Statutes so referred to enacts that "jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in such court, so far as such mode may be practicable by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and impaneling of jurors, in substance, to the laws and usages relating to jurors in the state courts from time to time in force in such state."

Among other rules promulgated by this court in October, 1871, was the following:

"It is ordered that grand and petit jurors be selected by the court in conformity with the laws of Tennessee. * * * It is further ordered that

the laws of the highest courts of the state of Tennessee in reference to the selection and impaneling of jurors and challenging of jurors shall constitute the rule of action and practice in this court."

Under the Tennessee Code, "every male citizen who is a freeholder or householder, and twenty-one years of age, is legally qualified to act as a grand or petit juror, if not otherwise incompetent under the Code." T. & S. Code, Tenn. § 4002. In addition to the provisions of the statute contained in said section 800 of the Revised Statutes, particularly applicable to juries, section 914 enacts that "the practice, pleadings, forms, and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, forms, and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit and district courts are held, any rule of the court to the contrary, notwithstanding." Rev. St. § 914.

The rule of court cited above embraces the *challenging* of juries, as well as their *designation* and *impaneling*, although the former word is not found in section 800 referred to; but the case of *U. S.* v. *Shackelford*, 18 How. 588, decides that this provision, originally enacted July 20, 1840, empowers the federal courts to make rules regulating the challenges of jurors, though some doubts had been expressed previously on the subject by the circuit courts. In *U. S.* v. *Douglass*, 2 Blatchf. 207, it was held that the section applies both to the "mode and manner of obtaining the general panel of jurors in court," as well as to the "method of impaneling them in a specific case on trial." *Silsby* v. *Foote*, 14 How. 219; *U. S.* v. *Reed*, 2 Blatchf. 435; *U. S.* v. *Tallman*, 10 Blatchf. 21; *U. S.* v. *Woodruff*, 4 McLean, 105; *U. S.* v. *Collins*, 1 Woods, 499; *Huntress* v. *Epsom*, 15 FED. REP. 732.

It is unnecessary to decide, however, whether the question of a new trial for the alleged incompetency of the juror shall be wholly determined by the law of this state or by the common law, as by either test it is believed the motion should be denied. Motions for a new trial in Tennessee, even in criminal cases, have been always regarded with disfavor by courts when the motions are grounded on such disqualifications of a juror as a challenge *propter defectum* upon the trial would disclose. The want of these purely statutory qualifications, such as citizenship, age, property, sex, etc., which do not go to make up the really (not purely legal) necessary and essential qualities to enable the juror to do his duty intelligently and impartially in the case, have never in this state, or elsewhere, been treated with the same strictness as objections to the juror for bias, partiality, criminality, and the like causes reached by challenge *propter affectum* and *propter delictum* as designated in the common law. Indeed, the courts are swift to lay hold of an argument or fact in the record on which to ground a denial of these motions when based upon the *propter defectum* class of juror disqualifications, especially where they can see

that no injury has thereby resulted to the party objecting to the verdict. The leading case in our state on the subject is *McClure* v. *State*, 1 Yerg. 206, decided in 1829. The motion there was because one of the jurors was an atheist, and the record shows that defendant did not know of the objection until after verdict, and hence did not challenge the juror at the trial. The motion was overruled, the court treating the objection as one *propter defectum*, and saying, per WHITE, J.:

"It follows that the proper time for challenging is between the appearing and the swearing of the jurors. * * * These authorities show that this exception comes too late after the juror was sworn, the matter existing before. To this is answered that the defendant did not know it till afterwards. * * * Be that as it may, it is not a good ground for a new trial."

And per CATRON, J.:

"The objection comes too late. If the juror is not a good and lawful man, can he be challenged after he is sworn? The ancient and well-settled English authorities are that you cannot challenge the juror after he has been sworn unless it be for cause arising afterwards. * * * It would be most dangerous to pursue a different practice."

The motion for a new trial in *Gillespie* v. *State*, 8 Yerg. 507, (1835,) was based on the fact that two of the jurors were members of the grand jury who found the indictment, supported by the defendant's affidavits that they did not know this till after the court had charged the jury. In sustaining the action of the court below, overruling the motion, CATRON, J., speaking for the court, says:

"Nor is want of knowledge an exception to the general rule. * * * If the juror be not challenged he is competent to try the issue, nor can it be permitted to let the defendant annul the verdict against him on his affidavit of want of knowledge,—always to be had in cases of convicted felons, and which are not subject to be disproved."

In *Ward* v. *State*, 1 Humph. 253, (1839,) after the jury were sworn, on motion of the district attorney 10 jurors were allowed to be challenged because not freeholders. In a judgment overruling the action of the circuit court in this regard it is said:

"It is too well settled, both by the authorities of the courts of Great Britain and of the state of Tennessee, that it is too late, after a jury has been sworn, to challenge any of its members *propter defectum*, to be now a debatable point."

And in the case of *Calhoun* v. *State*, 4 Humph. 477, (1844,) a new trial was denied on a conviction of murder, with death sentence, on defendant's affidavit of want of knowledge, till after verdict, that one of the jurors was not a freeholder, the court using this language:

"This has been so repeatedly held in this state to be no cause for a new trial, and the reasoning therefor has been so repeatedly gone into in various cases heretofore examined and reported, that we deem it wholly unnecessary to add a word further thereto."

The somewhat novel case of *Hines* v. *State*, 8 Humph. 598, (1848,) shows that a juror sworn on his *voir dire* as to opinion, property,

kinship, etc., "in answer to questions by the court," qualified himself so far as inquired of, was pronounced a good and lawful juror by the court, accepted by both sides, and ordered into the box, but, before taking his seat, told the clerk he was not 21 years old. The court, on being informed of this, after further examination ordered him to stand aside. In reply to the argument that the time had passed for pronouncing a judgment on the juror's qualifications, the supreme court says:

"We think that, until the jury shall be sworn in the case, the court may, for any good cause, discharge a juror that has been selected, and select another in his place."

In the case of *Bloodworth* v. *State*, 6 Baxt. 614, one of the errors raised by the bill of exceptions was that two of the grand jurors had served in the court within 12 months, which was held to be no error, the court, in its opinion, saying, *inter alia:*

"As to a petit jury, it is the right of either party to the case to get clear of the incompetent juror by challenge, and, if he fails from proper cause to exercise this right at the proper time, it would be a conclusive waiver of it and the verdict of the jury be valid."

The late case of *Draper* v. *State*, 4 Baxt. 253, (1874,) shows that the motion for a new trial was made because a juror was neither a freeholder nor householder, and that the defendant was ignorant of this at the trial. It does not appear from the record what answers the juror made on his preliminary examination, but the court, in disallowing a new trial, assume that the juror, supposing himself competent, answered accordingly.

The cases of *Howerton* v. *State*, Meigs, 262; *Troxdale* v. *State*, 9 Humph. 411; and *Brakefield* v. *State*, 1 Sneed, 215, relied upon by the defendants here, were all cases where the objections to the juror were made because of bias or partiality or prejudice, evidenced by the formation and expression of opinion by the juror. Such objections, which give a party the right to challenge *propter affectum*, go to the purity of the verdict, and its fairness and correctness, and are governed by a different principle than those presented in this case.

The rule thus shown to be the law of Tennessee is, unquestionably, the well-settled English doctrine, and the result of more than two centuries' growth. A few of the earlier common-law cases will be referred to, illustrating the principle: *Aylett* v. *Stellam*, Style, 100, was decided in 24 Car. I., as follows:

"Twisden, upon a rule to show cause why there should not be a new trial, said that two things were alleged on the other side that there ought to be a new trial: (1) That two of the jurors were kin to the plaintiff. * * * To the first of which he answered that the jurors were not of kin, and produced an affidavit for proof. ROLLA, J., interrupted him, and said: 'It is not now material whether they be of kin or no, for the defendant would have taken advantage of that upon his challenge at the trial.' "

So, also, in *Loveday's Case*, Id. 129: