BEVERLY BROWN *vs.* THE STATE.

This Court will presume that the court below assigned counsel for a prisoner indicted for felony, if he was without counsel and unable to employ any, and requested counsel to be assigned.

Any irregularity in the issuance or direction of the *venire* to summon the petit jury, must be excepted to before the jurors are sworn; not after verdict returned.

A general judgment for costs means such costs as are incurred by the plaintiff in that case against the defendant.

Error to Union Circuit Court.

The original transcript filed in this case contained no statement of the empanneling of the grand jury; and as that defect was assigned for error, the Supreme Court ordered, of its own motion, a special writ of *certiorari* to amend the record. The return to the writ of *certiorari* showed that a grand jury was duly summoned, empanneled and sworn.

The defendant in the Court below, with two others, was indicted for horse stealing. The record states that the indictment was found on the 10th of October; a *venire* to summon thirty jurors "including the original pannel of jurors returned to this term of the Court" was ordered, issued, executed and returned on the 11th day of October. On the 12th, the defendants were brought into Court in custody; the indictment read to them: they pleaded not guilty, and severed: and this defendant tried and convicted, and judgment rendered in accordance with the verdict. The judgment for costs is "for all her cost in this behalf expended."

The record does not show whether the defendant had counsel or not; whether he was able or unable to employ counsel, or whether he requested the Court to assign him counsel; nor that he took exception to any of the proceedings.

E. H. ENGLISH, for the plaintiff, made the following points: 1st, That the record does not show that the grand jury was legally empanneled. 2d, That the defendant had no counsel in the court below. (*Dig. p.* 406.) 3d, That it was in violation of law to order a *venire* before arraignment. 4th, That the *venire* should have gone to the body of the county generally. (*Ch. C. L.* 411. *Dig.* 411.) 5th, That the judgment against defendant was for all the costs—including the costs against his co-defendants before severance.

J. J. CLENDENIN, contra. The issuing of a *venire* before issue joined, is matter of form, and should have been taken advantage of before plea.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The first objection taken to the judgment of the Circuit Court in this case is, that the caption to the indictment fails to show that the grand jury, by whom it was found, were legally empanneled. This ground of objection has been removed by the transcript sent up upon the return of the writ of *certiorari* which was issued by this Court upon its own motion to perfect the record.

It was next intimated by the counsel for the defendant that the Court below erred in proceeding with the prosecution without having first assigned counsel to conduct the defence. Whether the defendant had the aid of counsel or not in the Court below, we have no means of ascertaining, as the record is wholly silent upon the subject. The statute, it is admitted, makes it the duty of the court to assign counsel to conduct the defense of any person about to be arraigned upon an indictment for a felony, in case he shall be without counsel, and shall also be unable to employ any, and in case he shall request the same. The record does not show a request ot the court to assign counsel, nor any disinclination on the part of the court to discharge its duty in that respect, and consequently, if the defendant has suffered for the want of counsel to aid him in his defence, he has no means upon this record of obtaining relief. In the absence of any show-

ing of record to the contrary, the legal presumption is that the court discharged every duty incumbent upon it. The objections urged to the time and manner of summoning the jury who tried the case, are all too late to avail any thing. If the *venire* issued prematurely, or was not directed generally to the whole body of the county, the exception might have been taken before the jurors were sworn; and if so taken, might or might not have prevailed according to circumstances; but it is most unquestionably too late to raise such objections after the jurors have been sworn and returned a verdict upon the merits of the case.

The last objection relates to the judgment, in giving the State all her costs in that behalf expended against the defendant. If the State has expended other costs, besides those which she incurred in the prosecution of the present defendant, she cannot collect them from him, as she can only collect such costs under this judgment as she is entitled to from him, and not such as she may be entitled to from other defendants. (See *Brown's ad'm v. Hill & Co.*, 5 *Ark.* 80, and *Carlock v. Spencer and wife*, 2 *Eng. Rep.* 24.)

We have not been able to discover any error in the judgment of the Circuit Court, and consequently it must be in all things affirmed.