Selden Society

FOUNDED 1887

To encourage the Study and Advance the Knowledge of the History of English Law

1989

READINGS AND MOOTS AT THE INNS OF COURT IN THE FIFTEENTH CENTURY

VOLUME II

MOOTS AND READERS' CASES

EDITED FOR
THE SELDEN SOCIETY
BY

SAMUEL E. THORNE, LL.D., F.B.A.

Emeritus Professor of Legal History,
Harvard Law School

AND

J. H. BAKER, LL.D., F.B.A.

Professor of English Legal History, Cambridge;
Honorary Bencher of the Inner Temple

LONDON
SELDEN SOCIETY
1990

one of us, that shall serve him against both of us, because one shall not put his life twice in jeopardy for one same felony.

And *Frowyk* and *Brudenell* thought clearly that here the defendant must do battle with all the plaintiffs in an appeal together, and if he vanquishes one of them in the field that is a discharge against them all, like a release by one. And they said that if the battle is done only [between] one plaintiff and the defendant, who vanquishes the plaintiff, the trial is nothing but a jeofail; and his death shall abate the writ, and the others shall both have a fresh appeal by survivorship. (That differs from the reader's view.) But *Brudenell* thought that where the defendants in an appeal join in one plea, such as Not guilty, they must join in trial by the country [or] in battle. (Query this.)

[104][1] In an indictment or an appeal the defendant shall have his peremptory challenges, [which he does not have] in other actions, because when his life is at risk he is so troubled in his mind through fear of death that he has neither the boldness nor the presence of mind to show cause; and because the law presumes that he has a secret cause in his mind, which he does not know how to show in a suitable manner, he may therefore challenge thirty-five peremptorily without showing cause. This is in favour of his life in these cases, more than in other actions. And he said he had seen it adjudged that where the defendant on indictment challenged a juror for insufficiency of freehold he was received on the same day to challenge him peremptorily, but it was never doubted that on another day the peremptory challenge would be bad. And he said that if a sheriff receives money from the plaintiff to make a panel, but does not return anyone at [the plaintiff's] nomination, this is not a principal challenge. (Query.)

[105] A jury finds for the plaintiff, and the judgment is reversed by [writ of] error; then one of the same jurors is made sheriff; in another action on the same matter, on which issue [is joined], this is a principal challenge to the array, according to *Littleton*, reader.

Frowyk to the contrary. Nor is it a challenge to the poll if one of that *venire facias* was one of the former jurors, because it is presumed that upon better information and evidence the same jurors may change their first verdict. And it is not improper on such considerations, because at common law before the new statute[2] it was no challenge when a party was arraigned to say that one of the jurors now returned was one of his indictors. That fully proves this case; and of that you may see the opinion of the justices in 8 Edw. IV.[3] That was where on an indictment for trespass the defendant pleaded Not guilty, and on the *venire facias*

[1] The subject of challenges is discussed in Littleton's reading, CUL MS. Hh. 3. 6, fo. 8v.
[2] 25 Edw. III, st. 5, c. 3 (*SR*, II, 320).
[3] Presumably Pas. 7 Edw. IV, fo. 4, pl. 11. Cf. Mich. 8 Hen. IV, fo. 2, pl. 4; Mich. 18 Edw. IV, fo. 13, pl. 8.